(12)

No. 03-1234
Vide 03-1230
Title: Mid-Con Freight Systems, Inc., et al., Petitioners
v.
Michigan Public Service Commission, et al.
Docketed: March 2, 2004
Lower Ct: Court of Appeals of Michigan
Case Nos.: (226052, 226122, 226053, 226137)
Decision Date: March 11, 2003
Discretionary Court
Decision Date: December 3, 2003
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Feb 26 2004	Petition for a writ of certiorari filed. (Response due April 1, 2004)
Mar 18 2004	Order extending time to file response to petition to and including May 3, 2004.
May 3 2004	Brief of respondents Michigan Public Service Commission, et al. in opposition filed.
May 14 2004	Reply of petitioners Mid-Con Freight Systems, Inc., et al. filed.
May 18 2004	DISTRIBUTED for Conference of June 3, 2004.
Jun 7 2004	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 17 2004	Brief amicus curiae of United States filed. VIDED.
Dec 29 2004	DISTRIBUTED for Conference of January 14, 2005.
Jan 5 2005	Supplemental brief of respondents Michigan Public Service Commission, et al. filed. VIDED. (Distributed)
Jan 5 2005	Supplemental brief of petitioners Mid-Con Freight Systems, Inc., et al. filed. (Distributed)
Jan 14 2005	Petition GRANTED limited to the following question: Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.
Jan 21 2005	The orders granting the petitions for writs of certiorari are amended to read as follows: The petitions for writs of certiorari are granted limited to the following questions: 1) "Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution." 2) "Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. §14504." The cases are consolidated and a total of one hour is allotted for oral argument. (See 03-1230)
Feb 1 2005	Motion to deconsolidate the cases or, in the alternative, enlargement of time for oral argument and for divided argument filed by petitioners. VIDED.
Feb 7 2005	Response to petitioners' motion to deconsolidate the cases. VIDED.
Feb 21 2005	Joint appendix filed. VIDED.
Feb 22 2005	SET FOR ARGUMENT ON Tuesday, April 26, 2005.
Feb 25 2005	Brief of petitioners Mid-Con Freight Systems, Inc., et al. filed. VIDED.
Feb 28 2005	Brief amicus curiae of United States in support of petitioners filed.
Mar 9 2005	Letter filed by petitioners' to supplement their motion for divided argument (VIDED).
Mar 15 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Mar 16 2005	Joint response by petitioners to the motion of the Acting Solicitor General for leave to

	participate in oral argument as amicus curiae and for divided argument. VIDED
Mar 16 2005	Record received from Court of Appeals of Michigan. (1 box)
Mar 25 2005	CIRCULATED.
Apr 4 2005	The motion to deconsolidate the cases or in the alternative to enlarge the time is Denied. The motion for divided argument is Granted to be divided as follows: 15 minutes for petitioners in 03-1230; 10 minutes for petitioners in 03-1234; 25 minutes for respondents; and 10 minutes for United States. VIDED.
Apr 4 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. VIDED.
Apr 4 2005	Brief of respondents Michigan Public Service Commission, et al. filed. VIDED. (Distributed)
Apr 18 2005	Record received from Circuit Court of Michigan. (2 boxes)
Apr 19 2005	Reply of petitioners Mid-Con Freight Systems, Inc., et al. filed. VIDED. (Distributed)
Apr 20 2005	Record received from Supreme Court of Michigan. (1 envelope)
Apr 26 2005	Argued. For petitioners in 03-1230: Robert Digges, J., Alexandria, VA. For petitioners in 03-1234: James H. Hanson, Indianapolis, Ind. For respondents: Henry J. Boynton, Assistant Solicitor General, Lansing, Mich.; and Malcolm L. Stewart, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
AND LAFOND EXPRESS, INC., on behalf
of themselves and all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN DEPARTMENT OF TREASURY,
MICHIGAN DEPARTMENT OF COMMERCE,
AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari
To The Michigan Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May States avoid the $10 per-vehicle fee cap of the expressly preemptive Single State Registration System (and its predecessor "bingo card" program) by charging $100 per vehicle to certain interstate motor carriers and calling the charge a "regulatory fee?"

LIST OF PARTIES

Additional parties to the proceedings below were as follows: (a) As plaintiffs, Westlake Transportation, Inc.; Gerig's Trucking & Leasing, Inc.; Bestway Express, Inc.; Van Der Kooi Carriers, Inc.; Prism, Inc.; El Toro, Inc.; Myriah, Inc.; Troy Cab, Inc.; Deeco Services, Inc., d/b/a Deeco Transportation; Frank Tiberio, d/b/a Fairfield Towing; Dale Constine & Sons, Inc.; Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company; Ambassador Transportation, Inc.; Hawkins Steel Cartage, Inc.; JLH Transfer, Inc.; H&H Enterprises, Inc., d/b/a S&M Cartage; Central Transport, Inc.; Bancroft Trucking Co.; U.S. Truck Co., Inc.; West End Cartage, Inc.; Central Cartage Co.; CTX, Inc.; Mohawk Motor of Michigan, Inc.; Economy Transport, Inc.; McKinlay Transport, Ltd.; Mason & Dixon Lines, Inc.; Universal Am-Can, Ltd.; Romeo Expeditors, Inc.; Tom Thumb Services, Inc., d/b/a Rei; O-Jay Transport Company; J. Law Enterprises, Inc.; and Alliance of O-Jay Transport, Inc.; (b) as intervening plaintiffs, The American Trucking Associations, Inc. and TNT Holland Motor Express, Inc.; and (c) as defendants, the Commissioners and Chairman of the Michigan Public Service Commission; the Treasurer of the State of Michigan; and the Director of the Michigan Department of Commerce.

RULE 29.6 STATEMENT

Petitioners, Mid-Con Freight Systems, Inc. and Lafond Express, Inc. f/k/a Elex, Inc.,[1] have no parent companies and are not owned in any respect by any publicly-held entity.

[1] Prior to changing its corporate name, Lafond Express, Inc. appeared as "Elex, Inc." in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Mid-Con Freight Systems, Inc. and Lafond Express, Inc., respectfully petition for a writ of certiorari to review a judgment of the Michigan Court of Appeals.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (App. 1-35) is reported as *Westlake Transportation, Inc. v. Michigan Public Service Comm'n*, 255 Mich.App. 589, 662 N.W.2d 784 (2003). The trial court rulings (App. 36-72) and the judgment of the Michigan Supreme Court denying leave to appeal (App. 73-75) are all unreported.

JURISDICTION

The Michigan Court of Appeals decision was entered March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' timely application for leave to appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (2000 ed.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy and Commerce Clauses of the United States Constitution, Art. VI, cl. 2 and Art. I, § 8, cl. 3, provide in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof

> . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *
>
> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .

Relevant statutory provisions reproduced in the Appendix are 49 U.S.C. § 11506 (1988 ed.) (repealed) (App. 76-77); 49 U.S.C. § 11506 (1994 ed.) (repealed) (App. 78-81); 49 U.S.C. § 14504 (2000 ed.) (App. 82-85); and Mich. Comp. Laws Ann. § 478.2 (West 2002) (App. 86-88).

STATEMENT OF THE CASE

The decision below disrupts the comprehensive federal regulatory plan of the Single State Registration System ("SSRS") and slights Congress's plenary authority to regulate interstate commerce. For over thirty-five years, Congress has imposed an explicit preemptive limitation upon the per-truck identification fees levied against interstate motor carriers registering their operations with State regulatory commissions and has expressly declared fees in excess of the amount authorized to be a burden upon interstate commerce. Nevertheless, the court below held that the Michigan Public Service Commission ("PSC") may exceed the federal fee cap by tenfold and evade preemption by calling its levy a "regulatory fee." That decision is plainly inimical to the SSRS, irreconcilable with other precedent, and important to interstate trucking operations throughout the country. The Michigan Court of Appeals ruling, therefore, warrants review.

1. As recently discussed in *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002), the 1991 enactment of the Intermodal Surface Transportation Efficiency Act ("ISTEA") amended longstanding federal law to create a new uniform system known as the SSRS under which State regulatory commissions may register interstate motor carriers before authorizing their vehicles to cross into State territory. As it concerns the fees that may be charged in connection with such limited State regulation of interstate trucking, however, the SSRS is little different from its statutory predecessor. Controlling federal law has long preempted flat, per-vehicle registration and identification fees in excess of $10.

In 1965, Congress exercised its authority under the Commerce Clause and directed the Interstate Commerce Commission ("ICC") to adopt standards under which States might require motor carriers to prove the lawfulness of their interstate operations. Congress's purpose was to protect legitimate carriers from the "not only illegal but also manifestly unfair" competition of unauthorized truckers and to establish "uniformity of registration" because "registration requirements differ[ed] widely among the States" and could "impose undue burdens on carriers." H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2924-2925, 2929. The proposed regulatory standards would permit the States to (1) require evidence of the carriers' ICC operating authority; (2) compel the filing of proof of insurance; (3) demand the designation of service of process agents; and (4) register and identify motor vehicles operating under the carriers' ICC authority. 49 U.S.C. § 11506(a) (1988 ed.). Congress made its intent plain as to the preemptive effect of the new standards by expressly stating as follows:

> When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden [on interstate transportation].

49 U.S.C. § 11506(b) (1988 ed.).

Pursuant to Congress's directive, the ICC adopted regulations permitting State regulatory commissions to register and identify interstate motor carrier vehicles for a fee assessed on a per-vehicle basis. As proof of registration and identification, each State participating in the program issued what were known as "bingo stamps" for each vehicle, and the stamps were placed on vehicle-specific "bingo cards." *See Yellow Transportation*, 537 U.S. at 39; *National Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 724 (D.C. Cir. 1994). During all years relevant to this case, the applicable ICC regulation has always imposed a fee cap of $10 for each vehicle registered and each identification stamp issued. *See* 49 C.F.R. § 1023.33 (1991). Indeed, an historical review of the regulation from 1982 forward reveals that it remained unchanged until 1992 when the ICC began rulemaking proceedings to implement the SSRS.

In 1991, the ISTEA dismantled the "bingo card" system and directed the ICC to amend its registration standards. Under the new SSRS program, each interstate motor carrier is now required to register annually with only a "base" State that collects and distributes fees for all other States participating in the program through which the carrier operates. Like the "bingo card" system, the SSRS permits the registration of interstate operating authority, the filing of proof of insurance, and the designation of local agents. Most importantly, however, the SSRS eliminated vehicle-specific registration and identification

by State regulatory commissions and "capped the per-vehicle registration fee that participating States could charge interstate motor carriers." *Yellow Transportation*, 537 U.S. at 40. Specifically, Congress expressly adopted the ICC's $10 per-vehicle fee cap when it designed the SSRS to include

> *a fee system . . . that* (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) *will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . .*

49 U.S.C. § 11506(c)(2)(B)(iv) (1994 ed.) (emphasis supplied).[2]

2. Michigan is a longstanding participant in the SSRS and the predecessor "bingo card" program. During all times relevant to this action, the Michigan Motor Carrier Act, at Mich. Comp. Laws Ann. § 478.7(1) (West 2002), has prohibited motor carriers from engaging in the interstate transportation of property in Michigan "without first having registered with the [PSC] and paid the required registration and vehicle fees." As recounted in

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[2] Effective January 1, 1996, 49 U.S.C. § 11506 (1994 ed.) was repealed and recodified at 49 U.S.C. § 14504 (2000 ed.). Both statutes expressly provide that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 11506(c)(2)(C) (1994 ed.) (emphasis supplied); 49 U.S.C. § 14504(c)(2)(C) (2000 ed.) (emphasis supplied).

Yellow Transportation, reciprocity agreements with other States might call for a lesser charge, but the statutory maximum fee levied for each registering interstate carrier is $10 per truck, per year. Mich. Comp. Laws Ann. § 478.7(4) (West 2002). Curiously, however, for registering interstate carriers that also purchase vehicle license plates in Michigan, the PSC "waives" the federally-compliant $10 fee and substitutes in its stead a *$100* fee imposed by Mich. Comp. Laws Ann. § 478.2(2) (West 2002) on "each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[3] The $100 fee – payment of which also requires the carrier to identify its trucks by make, model, and serial number and to obtain an identifying decal for each – is referred to as the "Interstate Decal Fee."

Whether an interstate carrier pays $10 or $100 per truck, the PSC has always required of all carriers the same federally-authorized information (evidence of federal operating authority, proof of insurance, and name of service of process agent) under the SSRS and its predecessor "bingo card" program. When the $10 fee is collected, it

[3] Michigan Comp. Laws Ann. § 478.2(2) is not a model of clarity in its ambiguous reference to "each vehicle . . . registered in this state" given that interstate motor carriers also "register" their operations under the SSRS. There is no dispute, however, that it is the interstate motor carrier operating Michigan-plated trucks that is assessed the $100 fee. In addition, although Mich. Comp. Laws Ann. § 478.7(4) does not exempt any interstate truck from the federally-authorized $10 fee, the PSC has consistently represented that it "waives" the $10 fee when it charges carriers the $100 fee for Michigan-plated trucks. *See* App. 16 n.6 (citing *Schneider Nat'l Carriers, Inc. v. State*, 247 Mich.App. 716, 721, 637 N.W.2d 838, 840 (2001), *vacated on other grounds*, ___ Mich. ___, 659 N.W.2d 228 (2003)).

is generally "placed to the credit of the [PSC]," and a designated portion of the revenue generated must be deposited in the Michigan Truck Safety Fund. Mich. Comp. Laws Ann. § 478.6; § 478.7(5) (West 2002). The $100 Interstate Decal Fee is not statutorily directed to any particular purpose. Rather, like all PSC fees imposed upon *intrastate*-operated motor carrier vehicles, the Interstate Decal Fee is "placed to the credit of the [PSC]," and may be appropriated "to the [PSC] and the motor vehicle highway fund in such proportions as the legislature may determine." Mich. Comp. Laws Ann. § 478.6. According to the PSC, the Interstate Decal Fee, together with all fees collected from *intrastate* carriers, supports "enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial motor vehicles and motor carriers."[4]

3. Petitioners brought suit in the Michigan Court of Claims on behalf of all carriers subject to the Interstate Decal Fee and were certified as class representatives authorized to prosecute the action on behalf of similarly-situated class members.[5] Petitioners argued that the Interstate Decal Fee, to the extent it exceeds $10 per vehicle, is preempted by the SSRS. App. 38. In addition, because class members filed suit on January 3, 1995 and

[4] *Affidavit of Thomas R. Lonergan*, ¶¶ 15-16 presented to the Court of Claims and Court of Appeals.

[5] The lower court proceedings involved two consolidated cases that presented a combined challenge to both the Interstate Decal Fee and a separate $100 decal fee imposed by Michigan on intrastate-operated motor carrier vehicles. App. 37. The challenge to the intrastate fee was based upon separate legal grounds and is not the subject of this Petition.

claimed refund rights under a three-year statute of limitations, Petitioners similarly maintained that Interstate Decal Fees exceeding $10 per vehicle were preempted by the federal "bingo card" program in effect before the January 1, 1994 implementation of the SSRS. App. 18; 68. The State responded that federal preemption principles were inapplicable because the Interstate Decal Fee was assessed in connection with the plating of interstate motor vehicles and allegedly had no relationship to SSRS or "bingo card" registration.

The Court of Claims ruled that the Interstate Decal Fee was not preempted. The court initially overlooked the aspect of Petitioners' claim pre-dating January 1, 1994 and addressed the SSRS first. It decided that the SSRS did not preempt the Interstate Decal Fee because the federal $10 per-vehicle fee cap applied to "participating states," but not the "registering state." App. 46. On motion for reconsideration, when reminded of the pre-SSRS portion of Petitioners' complaint, the Court of Claims also ruled against preemption under the predecessor "bingo card" program based on the same theory that the $10 fee cap imposed by the ICC did not apply to the "state of registration." App. 70. It was never clear whether the court's use of the terms "registration state" and "state of registration" was a reference to registration under the SSRS and "bingo card" programs or to vehicle "registration" involving the purchase of license plates.

4. Petitioners appealed, and the Michigan Court of Appeals affirmed the Court of Claims ruling on separate grounds. Finding that the statutory language and accompanying federal regulations were clear, the Court of Appeals ruled that the "registration state is simply a participating state in which a motor carrier is registering."

App. 15. Therefore, reasoned the Court of Appeals, "when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state." *Id.* Nevertheless, applying what it characterized as a "general presumption ... against federal preemption," App. 6, the Court of Appeals accepted the State's new argument that the Interstate Decal Fee is not and has never been preempted because it is a "regulatory fee."

Addressing the SSRS first, the Court of Appeals found that the Interstate Decal Fee "could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the [Michigan Motor Carrier Act], particularly covering costs of enforcing safety regulations." App. 16. The Court of Appeals then concluded that, "[b]ecause the fee ... is not a registration fee, it is not subject to preemption by 49 USC 11506." App. 16-17. Based upon the reasoning that "pre-1994 federal regulation substantially mirrored" the SSRS, the Court of Appeals also ruled that the Interstate Decal Fee, as a "regulatory fee," was similarly "outside the scope of the federal law and was not preempted" under the "bingo card" program. App. 19. The Michigan Supreme Court denied further review after timely application by Petitioners. App. 75.

REASONS FOR GRANTING THE WRIT

This case presents a compelling issue important to the federal regulation of interstate truck transportation and Congressional authority to preempt conflicting state laws. Just last term in *Yellow Transportation*, this Court reversed the Michigan Supreme Court in another SSRS case

and confirmed that Congress "capped the per-vehicle registration fee that participating States could charge interstate motor carriers." 537 U.S. at 40. The decision below, however, permits Michigan and other States to evade Congress's express preemptive mandate by conveniently characterizing higher-than-authorized per-truck identification fees as "regulatory" in nature. That decision cannot be reconciled with controlling federal law, the rulings of other State courts of last resort, or the message and purpose of Congress's action. In addition, the legal issue presented is of great significance to the trucking industry, to proper administration of the SSRS, and to interstate commerce.[6] Review of the decision below is therefore required.

A. The Lower Court Disregarded The Preemptive Force Of Controlling Federal Law, In Direct Conflict With Extensive Federal Court Precedent

The Michigan Court of Appeals decision reveals a fundamental misreading of the law of interstate trucking and federal preemption of interfering State laws. Whereas the Michigan court's starting point was a "presumption . . . against preemption" (App. 6; 18 n.7), this Court has ruled unambiguously that there exists no presumption against preemption when the matter at hand is "inherently federal in character" or when "the State regulates in an area where there has been a history of significant federal presence." *Buckman Co. v. Plaintiffs' Legal Committee*, 531

[6] For this reason, Petitioners urge the Court – just as it did in *Yellow Transportation* – to invite the Solicitor General to file a brief in this case expressing the views of the United States.

U.S. 341, 347-348 (2001); *United States v. Locke*, 529 U.S. 89, 108 (2000). This case presents just such a setting. The SSRS finds its roots in the Interstate Commerce Act, which is "among the most pervasive and comprehensive of federal regulatory schemes. . . . " *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981). Consequently, no presumption against preemption is at issue here, and the Michigan court's ruling thus conflicts directly with a long history of decisions in which the federal regulation of interstate commerce has been deemed paramount in its nullification of conflicting State law.

"Since the turn of the [twentieth] century," this Court has "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with Congressional policy as reflected in the [Interstate Commerce] Act." *Id.* Thus, what is at issue in this case is Congress's power to regulate and protect "the instrumentalities of [and] activities that substantially affect interstate commerce," *United States v. Lopez*, 514 U.S. 549, 558-559 (1995), as expressed by the explicit SSRS command that "[t]he charging or collection of *any* fee" in excess of the $10 per-vehicle fee cap "shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C) (2000 ed.) (emphasis supplied). Related applications of that power, as applied to interstate trucking, have been jealously guarded by this Court and others on occasions too numerous to tally in settings too varied to catalogue. Historically, for example, it has been held that federal motor carrier law supersedes State law on the subject of an interstate trucker's bill of lading liability for cargo damage, *Adams Express Co. v.*

Croninger, 226 U.S. 491 (1913), prohibited a State from revoking an interstate motor carrier's right to use state roads as punishment for violations of highway regulations, *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954), requires States to defer to federal authority for the interpretation of a motor carrier's interstate operating rights, *Service Storage & Transfer Co. v. Commonwealth*, 359 U.S. 171 (1959), and preempted laws purporting to require State approval for the transfer of an interstate motor carrier's stock or operating authority. *Leaseway Transportation Corp. v. Bushnell*, 888 F.2d 1212 (7th Cir. 1989). Most recently, Congress expansively declared that even "the regulation of intrastate transportation of property by the States has . . . imposed an unreasonable burden on interstate commerce," Pub. L. No. 103-305, 108 Stat. 1605 (1994), and its action was upheld when it severely restricted State regulation of intrastate trucking by broadly preempting all State laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1) (2000 ed.). *See Kelley v. United States*, 69 F.3d 1503 (10th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996) (upholding 49 U.S.C. § 14501(c)(1)).[7]

In short, it is "well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."

[7] *See also City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 430 (2002) (applying an "assumption that the historic police powers of the States were not to be superseded," but in the interpretation of an express statutory safety-related exception to the preemption provisions of 49 U.S.C. § 14501) (2000 ed.) (quoting *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991)).

Missouri Pacific R.R. v. Stroud, 267 U.S. 404, 408 (1925). With specific reference to this case, the SSRS and its predecessor "bingo card" program evidence a conspicuous exercise of that authority over State regulatory commission registration and identification of motor carrier vehicles moving in interstate commerce. When Congress first addressed the subject, it made plain that State registration requirements in excess of the ICC's standards were "an unreasonable burden on [interstate transportation]," 49 U.S.C. § 11506(b) (1988 ed.), and the resulting ICC standards imposing the $10 fee cap had no less preemptive effect than the federal statute under which they were adopted. *Fidelity Federal Savings & Loan Ass'n v. de la Cuestra*, 458 U.S. 141, 153 (1982). But if there were ever any question as to Congress's intentions, all doubt evaporated with implementation of the SSRS, the adoption of the $10 per-vehicle fee cap, and Congress's proclamation that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 11506(c)(2)(C) (1994 ed.) (emphasis supplied).

Notwithstanding a hundred years of preemptive federal regulation over interstate trucking and the express directive of the SSRS legislation, the Michigan Court of Appeals upheld the Interstate Decal Fee by finding it to be a so-called "regulatory fee" falling outside the preemptive scope of both the SSRS and its statutory and regulatory predecessors. That rationale is fatally flawed for several apparent reasons.

First, the Michigan Court of Appeals disregarded Congress's obvious intent. Nothing in Congress's mandate authorizes State regulatory commissions to charge a per-vehicle identification fee in excess of $10, and nothing in

the SSRS regulations or in the legislative history of the ISTEA suggests that anything more than $10 per vehicle is authorized. *See* 49 C.F.R. § 367.4 (2002).[8] To the contrary, Congress expressed concern over industry estimates that the "bingo card" program was costing carriers "up to $250 million per year," and it thus sought "to benefit the interstate carriers by eliminating unnecessary compliance burdens" in the hope that consumers too would profit from resulting cost savings. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. In other words, it was Congress's goal to establish "a fee system . . . that [would] minimize the costs of complying with the registration system," 49 U.S.C. § 11506(c)(2)(B)(iv)(II) (1994 ed.), which conflicts directly with any notion that States are free to increase carrier costs by tacking on additional fee expense (in this case, an additional $90) over and above $10 per vehicle.

Second, the Court of Appeals erroneously dismissed the impact of regulatory amendments under which the ICC long ago revoked all authority for additional per-vehicle

[8] In 1995, the ICC was abolished by the ICC Termination Act of 1995. The Federal Highway Administration thereafter adopted the ICC regulations that implemented the SSRS and transferred those regulations to 49 C.F.R. § 367.1 *et seq.* (1997). The regulations remain the same to this day, echoing Congress's declaration that "[t]he charging or collection of *any* fee that is not in accordance with the fee system established above is deemed a burden on interstate commerce" and providing that, "[t]o the extent *any* state registration requirement imposes obligations in excess of those specified in this part, the requirement is an unreasonable burden on transportation. . . . " 49 C.F.R. § 367.4(g); (h) (2002) (emphasis supplied). The Federal Motor Carrier Safety Administration is now the agency with regulatory authority over the SSRS. 49 U.S.C. § 113(f)(1) (2000 ed.).

"regulatory fees" imposed in connection with State registration and identification of interstate motor vehicles. *See* App. 17. Prior to 1982, ICC regulations prescribed a maximum fee of $5 for a "bingo stamp" and also authorized an additional fee in a "reasonable amount" to be used by State regulatory commissions "solely for defraying the cost of the regulation of carriers by highway operating within the borders of such State and the enforcement of laws pertaining thereto." 49 C.F.R. § 1023.33 (1981). However, the ICC amended its regulation in 1982 to "prescribe a maximum fee of $10," 47 Fed. Reg. 8365 (1982), expunging *all* reference to additional "regulatory" fees. 49 C.F.R. § 1023.33 (1982). The lower court therefore wrongly disregarded the maxim of *expressio unius est exclusio alterius* – the express mention of one thing implies the exclusion of other things[9] – and its corollary conclusion that after 1982 the ICC intended to eliminate all per-vehicle "regulatory fees" over and above $10.

Third, the Court of Appeals mistakenly decided that additional fees are not preempted because they are not expressly prohibited. *See* App. 18 n.7. Conflicting State laws that prevent or frustrate the accomplishment of a federal objective have long been preempted under Supremacy Clause jurisprudence, and this Court "has never before required a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873, 884 (2000). In any event, both Congress and the ICC were express, not silent, in their preemptive admonition

[9] 2A N. Singer, Statutes and Statutory Construction § 47:23 (6th ed. 2000 rev.).

that the "collection of any fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C). *See also* 49 C.F.R. § 367.4(g) (2002) (prohibiting the "charging or collection of any fee that is not in accordance with the fee system established above").[10]

Finally (and most commonsensically), the regulatory fee/registration fee theory adopted by the Court of Appeals poses a distinction with only one real difference – a difference of $90. The $100 Interstate Decal Fee is just as much a "registration fee" as the $10 SSRS fee because the Interstate Decal Fee is assessed in exchange for an identification device – a decal that is affixed to a vehicle the interstate carrier must *register* with the PSC by make, model, and serial number. Predictably, therefore, the Court of Appeals' reasoning is impeached by its own reference to the Interstate Decal Fee as a "registration fee," rather than a regulatory fee, in an opinion issued less than eighteen months before the decision in this case. *Schneider Nat'l*, 247 Mich.App. at 721, 637 N.W.2d at 840.

[10] In light of such express Congressional and regulatory intent, the Court of Appeals' citation to 49 C.F.R. § 1023.104 (1991) cannot support its decision. *See* App. 17. That regulation, which stated that the ICC's standards should not be construed "to affect the collection or method of collection of taxes or fees by a State from motor carriers for the operation of vehicles within the borders of such State," was not adopted with the 1993 amendments creating the SSRS regulations and is not current law. In addition, the regulation can only be "squared" with the ICC's longstanding $10 fee cap if it is interpreted as authorizing something *other than* per-vehicle identification fees specific to interstate motor carriers, such as income, fuel, and property taxes or the plating fees that every motor vehicle operator must pay.

By the same token, the SSRS fee is just as much a "regulatory fee" as the Interstate Decal Fee because *both* are unquestionably put to *some* "regulatory" purpose when they are "placed to the credit of the [PSC]" under Mich. Comp. Laws Ann. § 478.6 and a designated portion of the $10 SSRS fee is deposited in the Michigan Truck Safety Fund pursuant to Mich. Comp. Laws Ann. § 478.7(5). Therefore, notwithstanding its assessment through single-state "registration," it is not surprising that the SSRS fee was twice called a "regulatory fee" by a PSC representative on the record in *Yellow Transportation*, No. 01-270, 2002 W.L. 32102975, *5a-6a (U.S. Apr. 5, 2002) (Joint Appendix, Affidavit of Thomas R. Lonergan).

Accordingly, the "regulatory fee" justification is a too-convenient, too-superficial defense against the Interstate Decal Fee's preemption. When State regulatory commissions like the PSC require interstate carriers to *register* their operations, the $10 SSRS fee is *the* per-vehicle "regulatory fee" authorized by Congress's preemptive act.[11] The Michigan Court of Appeals decision to the contrary is not only violative of federal preemption principles, but also plainly incorrect.

[11] In this regard, the Court of Appeals' citation to 49 C.F.R. § 1023.105 (1991) (*see* App. 17) actually supports Petitioners' argument that the $10 per-vehicle fee was intended to be the sole means of collecting a "regulatory fee" because the regulation urged States to use the $10 fee "for the purpose of defraying the cost of regulation."

B. The Michigan Decision Also Conflicts With State Court Precedent

State court precedent on the subject of this case was too casually dismissed by the Michigan Court of Appeals. That precedent, although handed down under the old "bingo card" system, carries just as much if not more weight today in light of Congress's adoption of the $10 fee cap in creating the SSRS.

The first two reported cases arose in Montana. *State ex rel. Sammons Trucking, Inc. v. Boedecker*, 158 Mont. 397, 492 P.2d 919 (1972) addressed ICC regulations that, at the time, permitted a $5 maximum fee for the registration and identification of interstate vehicles. The Montana court struck down a $10 fee, ruling that "Congress has preempted the field of state regulation and identification of interstate motor vehicles using Montana highways." *Id.* at 400, 492 P.2d at 920. Similarly, in *State ex rel. Sammons Trucking, Inc. v. Bollinger*, 169 Mont. 88, 544 P.2d 1235 (1976), the court nullified the State's attempt to charge $5 each for the motorized unit and the trailer in a tractor-trailer combination. The court again expressed no hesitation in finding that the ICC regulations were "controlling as to the registration and identification of motor vehicles engaged in interstate commerce" and,

> to the extent that Montana statutes impose greater conflicting requirements, they constitute an undue burden on interstate commerce and must yield to federal authority.

Id. at 92, 544 P.2d at 1236. *See also Owner-Operator Independent Driver Ass'n v. Idaho Public Utilities Comm'n*, 125 Idaho 401, 871 P.2d 818 (1994) (affording

preemptive effect to a $10 fee authorized for state registration and renewal of ICC operating authority).

Then there is the Illinois case of *Roadway Express, Inc. v. Treasurer*, 120 Ill.App.3d 133, 458 N.E.2d 66 (1983). The issue addressed in *Roadway* was whether Illinois law complied with the pre-1982 ICC regulations that permitted a $5 per-vehicle fee, but also authorized States to charge additional "regulatory fees" in order to defray the costs of regulation. The additional amount charged by Illinois was not used for such a specific "regulatory" purpose, and the court therefore ordered refunds of all fees paid in excess of $5 per vehicle. In so doing, the court also acknowledged that no additional "regulatory fee" would be permissible after 1981 because the ICC's amended regulation in 1982 "set an absolute limit of $10 on identification stamp fees" for all future operations. *Id.* at 135, 455 N.E.2d at 69.

The Michigan Court of Appeals summarily dismissed these prior case law holdings based upon its attempted regulatory/registration fee distinction. *See* App. 19 n.8. Again, however, the $100 Interstate Decal Fee is just as much a "registration fee" as the fees struck down in Montana and Illinois because the PSC requires the annual filing of specific vehicle-identifying information in connection with each fee payment. If in modern-day jurisprudence such a practice is not "registration," then it is time to resurrect turn-of-the-last-century common sense and heed Justice Brewer's advice that "we must regard things rather than names." *Fairbank v. United States*, 181 U.S. 283, 304 (1901). Whatever "regulatory" purpose Interstate Decal Fee revenue may later serve, the fee is collected in the first instance in connection with a State regulatory commission's registration and identification of interstate

motor vehicles, which the Montana and Illinois courts rightly concluded is a subject preempted by federal law.

C. The Issue Presented Here Is Important To Federal/State Relations And To Interstate Carriers Caught In The Middle

As shown earlier, the Michigan Court of Appeals approached this case with an ill-conceived "presumption against federal preemption" that appears to have colored its views on the important federal-state conflict at issue. As a result, the decision below fails to give appropriate deference to Congress's Commerce and Supremacy Clause powers and creates a proverbial loophole through which States may escape time-honored federal authority and cause real harm to interstate motor carrier operations. That loophole should be closed by this Court for several important reasons.

First, the Michigan "regulatory fee" approach, if adopted by other States, poses a significant threat to Congress's goal of reducing the regulatory burdens imposed upon interstate motor carriers. From the very beginning, Congress sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" when it implemented the "bingo card" program in 1965. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. In so doing, Congress hoped to make registration requirements imposed by State regulatory commissions uniform. *Id.* Then, in 1991, the SSRS was designed as a more "streamlined administrative process" so as to reduce inefficiencies, eliminate unnecessary compliance burdens, and lessen carriers' costs. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. The decision below undermines each one of those goals by

signaling every State regulatory commission to add to its $10 SSRS fee any "regulatory fee" amount it chooses, which would subject interstate carriers to a quagmire of fees varying from State to State and make compliance more burdensome, less efficient, and certainly more costly.

Second, a so-called "regulatory fee exception" to the SSRS is little more than wordplay, as illustrated by the case before this Court. Nothing in Mich. Comp. Laws Ann. § 478.2(2) suggests any particular or special "regulatory" purpose to its assessment of the Interstate Decal Fee.[12] Rather, the most that can be said is that the Interstate Decal Fee, along with all PSC fees imposed on *intrastate* carriers, is "placed to the credit of the [PSC]" and may be appropriated "to the [PSC] and the motor vehicle highway fund in such proportions as the legislature may determine." Mich. Comp. Laws Ann. § 478.6. As a result, the Court of Appeals appears to have based its "regulatory fee" catch phrase on the broad statement of a PSC employee that the Interstate Decal Fee supports a whole host of laws governing commercial motor vehicles and carriers, which is the exact same "55 gallon drum" into which the

[12] It is this fact that distinguishes *Franks & Son, Inc. v. State*, 136 Wash.2d 737, 966 P.2d 1232 (1998), *cert. denied*, 526 U.S. 1066 (1999), a case cited by the Court of Appeals. *See* App. 16. In addressing an issue not raised in the later petition for certiorari, the court in that case incorrectly ruled that additional regulatory fees over and above the $10 SSRS fee are not preempted. But that decision was at least supported by an express and detailed statutory scheme evidencing an intent to impose a "regulatory fee" designed to "reasonably approximate the cost of supervising and regulating motor carriers." Also, the fee was the State's "sole source of funding for [its] motor carrier safety enforcement program." *Id.* at 1234-1235. As shown above, no such support exists for the Michigan Court of Appeals decision in this case.

PSC places a $100 decal fee imposed upon *intrastate*-operated vehicles.[13] That the Interstate Decal Fee is allegedly used to "regulate" interstate carriers in the *exact* same way intrastate vehicle fees are used to regulate Michigan intrastate carriers demonstrates the sophistry in the "regulatory fee" justification. "State regulation of interstate motor carriers exists as a matter of congressional grace," *National Ass'n of Regulatory Utility Comm'rs*, 41 F.3d at 723, which means the PSC simply cannot "regulate" interstate and intrastate carriers in an identical fashion.

Moreover, because any fee can be put to *some* later regulatory use, the opinion below invites each of the 39 SSRS States to increase its $10 fee by any amount it can expediently call "regulatory" in purpose. Interstate truckers, no longer protected by the $10 fee cap, will then be at the mercy of revenue-seeking State legislators with every incentive to decide that $10 or even $100 per vehicle is not enough for their "regulatory" needs. And because the Michigan court's ruling does not in any way limit the "regulatory fee" justification to trucks plated within the State, other jurisdictions may more expansively apply their fees to all interstate vehicles operated by any SSRS-registering carrier. The decision below thus sends a message that, if $100 for Michigan-plated trucks is permissible in Michigan, then $500 or $1,000 for every truck crossing

[13] *Affidavit of Thomas R. Lonergan*, ¶¶ 15-16 (describing Interstate Decal Fees and fees imposed on intrastate-operated vehicles as "combined" and used for the identical purposes of enforcing "the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers.")

Ohio, Kansas, or any of the other 36 SSRS States is perfectly acceptable too.

Third, the decision permits State regulatory commissions to increase interstate carrier costs without any real, practical justification. Lest there be some question in this regard, the Interstate Decal Fee cannot rest upon a hypothetical proposition (not even suggested by the Court of Appeals) that the Michigan-plated vehicles against which it is assessed somehow have a greater Michigan "presence" than vehicles plated elsewhere.[14] In fact, just the opposite is likely true. Interstate carriers plate their vehicles under the International Registration Plan ("IRP"), which authorizes "base-plating" in a single State that then collects, distributes, and apportions all other States' vehicle plating fees on a mileage basis. Michigan may be the base-plating State under the IRP merely because a motor carrier accrues mileage in Michigan and has a place of business there with a telephone line and an employee to make operational records available,[15] none of which demands a great "regulatory presence" within the State's borders. Conversely, large Michigan-based carriers with significant Michigan operations can side-step the Interstate Decal Fee entirely by plating their vehicles elsewhere at one of their many out-of-state locations. By way of example, TNT Holland Motor Express, Inc., although headquartered in Holland, Michigan, avoids the Interstate

[14] Note that, when carriers purchase their license plates in Michigan, a $15 portion of the plate fees they pay for each vehicle is already deposited in the Michigan Truck Safety Fund pursuant to Mich. Comp. Laws Ann. § 257.801(1)(k) (West 2003 Supp.).

[15] International Registration Plan, Art. II, §§ 210, 218 (2003 rev.).

Decal Fee by base-registering (plating) its large fleet in Illinois, not Michigan,[16] while a small, "mom and pop" carrier with only a few trucks and a Michigan office must pay the fee despite having virtually no Michigan presence at all.

There is indeed an irony in the fact that the trigger for application of the Interstate Decal Fee – the IRP base-plating of an interstate vehicle in Michigan – arises out of the same federal legislation that implemented the SSRS. Like the SSRS, the IRP was also adopted by the ISTEA in 1991[17] as part of a uniform, national plan to benefit interstate carriers. Just as it was concerned about creating uniformity and reducing costs in implementing the SSRS, Congress similarly standardized the IRP after heeding the House Public Works and Transportation Committee's advice that "[c]ompetition in the world marketplace dictates the elimination of unnecessary costs and the maximizing of efficiency." H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576. Furthermore,

[16] *Affidavit of James C. Crozier* presented to the Court of Claims and Court of Appeals. That carrier, now known as "USF Holland," reports through its publicly-traded parent that it had over $960 million in revenue in 2002 and operated over 4,400 vehicles from 60 terminals throughout the country. *See* http://www.usfc.com (Investor Relations; Financial Reports).

[17] Under the ISTEA, all States were given until September 30, 1996 to come into compliance with the IRP plating program. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1823. Pursuant to 49 U.S.C. § 31704 (2000 ed.), a State that is not a participant in the IRP may not "establish, maintain, or enforce a commercial motor vehicle registration law that limits the operation of a commercial motor vehicle that is not registered under the laws of the State" if the vehicle is IRP plated.

the key ingredient to the IRP is the *apportionment* of plating fees based upon the number of miles the carrier travels in each State, which not only "reduces the motor carrier's overall operating costs,"[18] but also stands guard against discriminatory taxation that burdens interstate commerce. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). It is not likely, therefore, that Congress could have intended to afford States free reign to increase the cost of either SSRS registration *or* IRP plating through the tacking on of a myriad of flat, unapportioned "regulatory fees" that frustrate the very purpose of Congress's action.

In sum, the lower court decision in this case must be overturned because, whether depicted as a "regulatory fee" or not, the Interstate Decal Fee violates Congress's proclamation that flat per-vehicle identification and registration fees imposed by State regulatory commissions are an unlawful burden upon interstate commerce and are forbidden by federal law unless limited to $10. Any other conclusion will subject interstate motor carriers to inconsistent, burdensome, and costly State regulation and interfere with the uniform federal regulatory program Congress has long envisioned.

[18] H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,

Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 226052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY,

AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,

Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Updated Copy
May 9, 2003

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In these consolidated class actions, plaintiffs, individual class-representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998, judgment of the Court of Claims that granted summary disposition in favor of defendants. The appeals were consolidated. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC 11501, 49 USC 11506, and subsection 601(h) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-105, subsection 601(h), on various provisions of Michigan's Motor Carrier Act (MCA), MCL 475.1 *et seq*. This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc., et al., filed their complaint, alleging that the state's $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC 11506 and 49 USC 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc., et al., filed their complaint, and made similar allegations.

In Michigan, since 1933, motor-carrier regulation has been pursuant to the Michigan MCA. The act authorizes the Michigan Public Service Commission (PSC) to enforce the act. MCL 475.1(c); MCL 475.2. Under the MCA, motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 a vehicle

for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor-carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor-carrier vehicles licensed in Michigan that engage entirely in interstate commerce.[1] The act also provides that motor carriers that are registered outside Michigan are required to pay a registration fee of $10 a vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, alleging that the intrastate-decal fee violated the Commerce Clause, US Const, art I, § 8, cl 3, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc., et al., and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs filed two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10): one regarding their intrastate-preemption claim and the other regarding their interstate-preemption claim. On June 30, 1995, intervening plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their claim alleging violation of the Commerce Clause. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998,

[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition in an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998, opinion.

The court concluded that § 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety-related regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law imposed the $10 maximum only on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not burden foreign motor carriers more heavily as compared to Michigan motor carriers engaged in interstate commerce, since the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo on appeal. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v Center Line,* 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the nonmovant. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 618; 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Konynenbelt v Flagstar Bank, FSB,* 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art VI, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & E R Co, Inc,* 237 Mich App 662, 665; 604 NW2d 702 (1999).

[2] This statute is currently codified as 49 USC 14504; however, we will refer to the law as § 11506.

Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC 11506 provided, in part:

> (b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
>
> (c) Single State registration system. –
>
> (1) In general. – The Secretary shall maintain standards for implementing a system under which –
>
> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of Federal registration; proof of insurance; payment of fees. – Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part –

(i) to file and maintain evidence of such Federal registration;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – The standards of the Secretary –

(i) shall require that the registration State issue a receipt, in a form prescribed under the

standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under

> subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System (SSRS) on January 1, 1994. With the implementation of the SSRS, § 11506 was amended and significant language changes were made. We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful. The United States Supreme Court has summarized this evolution in *Yellow Transportation, Inc v Michigan,* 537 US ___, ___; 123 S Ct 371, 374-375; 154 L Ed 2d 377, 383-384 (2002):

> Beginning in 1965, Congress authorized States to require interstate motor carriers operating within their borders to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 89-170, 79 Stat 648, 49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements

[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

> would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Ibid.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration,* 9 ICC2d 610, 610 (1993).

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States outweighed the benefits to those States and to the public. HR Rep No 102-171, pt I, p 49 (1991), HR Conf Rep No 102-404, pp 437-438 (1991), US Code Cong & Admin News 1991, pp 1526, 1679. In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.* See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § 11506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would – on behalf of all other participating States – register a carrier's vehicles, file and maintain paperwork, and collect and distribute

registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § 11506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system . . . that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." § 11506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICC's fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C).

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*Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(f)(1).

A

Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state,[4] and asserts that motor carriers registered in Michigan are required to be charged similarly.

Defendants' counterargument is two-fold. First, § 11506 applies to registration fees only, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 applies to participating states only, not the registration state. The court agreed with defendants' argument and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations that interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however,

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[4] MCL 478.7 provides, in part:

> (4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

any registration requirements of a state that are in excess of the standards in subsection 11506(c) are considered an unreasonable burden. Subsection 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. Subsection 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. Subsection 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[5] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra,* 123 S Ct 376; 154 L Ed 2d 385, and therefore, can be a registration state.

The registration state may require a motor carrier to (1) file proof of its federal registration (ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. Subsection 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. Subsection 11506(c)(2)(B). The fee is for the filing of the proof of insurance, and may not be charged for the filing of the motor carrier's ICC permit. Subsections 11506(c)(2)(B)(iv) and (v).

[5] 49 CFR 1023.1 *et seq.*, was recodified as 49 CFR 367.1 *et seq.*

In support of the registration fee, the motor carrier must file with the registration state a form that delineates (1) the number of vehicles it intends to operate in each participating state, (2) the fee each participating state charges each vehicle, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The fee each participating state is allowed to charge each vehicle is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. Subsection 11506(c)(2)(B)(iv)(III); 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[ ] the costs of complying with the registration system" for the motor carriers, subsection 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404 reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge cannot exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, so that it is subject to the limitation in § 11506, or whether it is a regulatory fee. Plaintiffs assert that the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Son, Inc v Washington,* 136 Wash 2d 737, 759-760; 966 P2d 1232 (1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.* at 760.

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[6] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v Lansing,* 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in

[6] Because vehicles licensed in Michigan that operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, Inc v Michigan (On Remand),* 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles licensed in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

MCL 478.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Plaintiffs argue that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v Treasurer of State of Illinois,* 120 Ill App 3d 133; 458 NE2d 66 (1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 133-134. At the time, the federal regulation allowed a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. *Id.* at 135. Plaintiffs contend that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted, "again parenthetically," that the federal regulation, 49 CFR 1023.33 (redesignated), was amended and set the limit at $10. *Roadway Express, supra* at 135.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carriers for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carriers within their borders. Therefore, the

ability of a state to collect fees in addition to the registration fees was not affected by the removal from § 1023.33 of the language providing for additional fees.[7]

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year period of limitation, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part:

> (b) The requirement of a State that a motor carrier . . . register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under

[7] We note that the substance of 49 CFR 1023.104 and 1023.105 was not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state-imposed regulatory fees. The statute and its regulations address registration requirements only. Because there is a presumption against federal preemption, we believe that Congress's silence cannot be interpreted as prohibiting state regulatory fees, see *Wisconsin Pub Intervenor v Mortier,* 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can coexist in the same field without conflicting, *Duprey, supra* at 665.

> subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
>
> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. . . .

The Commission prescribed the following interpretive regulation:

> The application for the issuance of such identification stamps or number shall . . . be duly completed and executed by an official of the motor carrier, and shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8]

[8] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on

(Continued on following page)

Accordingly, the court did not err in granting defendants summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC 14501[c].)

Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.

In re Fed Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal

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whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a

factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott,* 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra,* in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra,* and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not

foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills,* 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, Inc., et al., allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan Constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp,* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp,* 236 Mich App 141, 151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of [the MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

> to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances,

> charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.[10]]

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *id.* at 151, and thus benefit the general public.

Plaintiffs' argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[11] they became taxes because the amounts collected were in excess of the

[10] Any purposes that related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the Legislature has yet to amend the MCA to reflect the federal preemption.

[11] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

expenses related to the services. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Id.* at 151. "[W]here revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Hgts,* 211 Mich App 265, 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and they could only offer their opinion regarding how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-83 to 1994-95,[12] and one of the charts showed that there was a surplus nearly every year.[13]

[12] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers because a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC that enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the Legislature in accordance with the constitution to fund the civil service. Const 1963, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[13] Plaintiffs present no evidence regarding the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by § 601 of the FAAAA. Therefore, we have no basis on which to determine the proportionality of the fees after 1995.

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1), and defendants got confirmation from the author of the report that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding nonchallenged interstate fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 11.7 percent, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the Court of Claims did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because a motor carrier cannot operate its trucks in Michigan without paying it. Defendants argue that a motor carrier has a choice with regard to what extent its trucks will have a presence in Michigan, and, therefore, the exaction is voluntary. While this is true in regard to the application fee, MCL 478.1, defendants' logic is erroneous in regard to the administration fee, MCL 478.2(1), because every vehicle licensed in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary, when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees.

Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the Equal Protection Clause of the United States and Michigan Constitutions because they apply to "for-hire" motor carriers only and not to private motor carriers.[14] Both the federal and state constitutions guarantee equal protection, and afford similar protection. Const 1963, art 1, § 2; US Const, Am XIV, § 1; *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999).

Legislative classifications that do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dep't of Treasury,* 464 Mich 548, 557; 629 NW2d 402 (2001); *Vargo, supra* at 60. Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular

[14] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

group, or if the rationale seems to be tenuous. *People v Copper (After Remand),* 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic- and safety-regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one that receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing *Crego v Coleman,* 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that motor carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public, which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor Carrier Act, supra* at 302, recognized, the PSC "still has significant regulatory obligations,"

including supervising and regulating the safety of motor-carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns that existed before still existed. Accordingly, we conclude that the Legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the Court of Claims.

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states. . . ." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon,* 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The Court of Claims held that the Commerce Clause was not implicated because the fee applied to intrastate carriers only. However, any tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs,* 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any

vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the Court of Claims did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dep't of Treasury,* 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dep't of Treasury,* 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[15] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth,* 476

[15] Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady,* 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'ns, Inc v Scheiner,* 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York,* 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc,* 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm,* 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles that pay the fee operate solely intrastate, which presumably leads to their conclusion that the effect on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co of Indiana v Limbach,* 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest

benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates even-handedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate nondiscriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the state's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity

exists. *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the Court of Claims' summary-disposition ruling in favor of defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

APPENDIX B

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al.,

Defendants. /

DOCKET NO. 95-15628-CM

OPINION

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

OPINION

Before the Court in these consolidated class actions are three motions for partial summary disposition brought by Plaintiffs and Intervening Plaintiffs. All Plaintiffs collectively challenge the constitutionality and lawfulness of certain fees imposed on the trucking industry by Michigan statutes as administered by the Public Service Commission. The constitutional challenges are brought under both the federal and state constitutions, although those brought under Michigan fundamental law are not the subject of these motions. The nonconstitutional claims are predicated on federal statute and assert that the challenged fees violate such supreme law and thus must be enjoined.

The fees here challenged are mandated by Michigan's Motor Carrier Act (MCA or Act), 1933 PA 254 as amended, MCL 475.1, et seq; MSA 22.531, et seq. They are three in number and are delineated in two sections of article IV of the Act.

First there is the intrastate authority fee of $100.00 required when submitting to the Public Service Commission (PSC or Commission) an application for a certificate of authority or a permit, whether granted or not. That application fee is authorized by article IV, section 1 of the Act, MCL 478.1; MSA 22.560.

Second, section 2 of article IV, MCL 478.2; MSA 22.561, mandates annual fees of $100.00 for each motor vehicle operated by a motor carrier. Subsection (1) applies that requirement "for the administration of this act" to each vehicle used in intrastate service. Subsection (2) makes the same requirement applicable to each vehicle "registered in this state and operating entirely in interstate commerce" by a "motor carrier licensed in this state."

According to Plaintiffs, all three fees are unlawful because they, and especially the intrastate vehicle fee authorized by section 2(1), have been preempted by federal law. Further, they assert that the section 2(2) fee on each Michigan-registered vehicle operated entirely in interstate commerce by a Michigan-licensed motor carrier contravenes another provision of federal law that created the Single State Registration System for motor carriers in interstate commerce. Finally, they complain also that the section 2(1) fee imposed on vehicles operated in intrastate service offends the dormant Commerce Clause of the United States Constitution by discriminating against foreign motor carriers operating substantially in interstate commerce. The Court will treat each claim in order, beginning with that on which Plaintiffs primarily rely.

FEDERAL PREEMPTION

Federal preemption has its origin in the Supremacy Clause of US Const, art VI, which declares that the laws of the United States "shall be the supreme Law of the Land." However, federal provisions that invalidate state law must be narrowly tailored to support a presumption against preemption of state law. *Ryan* v. *Brunswick Corp,* 454 Mich 20, 27; 557 NW2d 541 (1997). State police powers are not superseded by federal provisions unless that is the clear and unequivocal intent of Congress. *Id.* This is especially true of state regulation of matters relating to health and safety. *Id.* The plain meaning of federal provisions must be given effect unless there is reason to think Congress intended a more restrictive reading. *Id,* p 28. Courts must seek the congressional intent from the text, structure and purpose of the federal provision as a whole. *Id.* Such considerations include "'the way in which

Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.'" *Id,* quoting *Medtronic, Inc* v *Lohr,* 518 US ___; 116 S Ct 2240, 2251; 135 L Ed 2d 700 (1996).

The Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-305, contains § 601, which added sub-section (h), "Preemption of State economic regulation of motor carriers," to 49 USC 11501, subsequently recodified as 49 USC 14501.[1] By virtue of § 601, effective January 1, 1995, the FAAAA preempts state economic regulation of motor carriers by providing that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier with respect to the transportation of property." 49 USC 11501 (h) (1), now recodified as 49 USC 14501 (c) (1). Such language clearly and expressly prohibits a state from enacting or enforcing laws related to economic aspects of the service provided by a motor carrier. See *Fitzpatrick* v *Simmons Airlines, Inc,* 218 Mich App 689, 691; 555 NW2d 479 (1996). The question then becomes whether Michigan's MCA is a law related to the price, route or service of a motor carrier. *Id.*

In *Morales* v *Trans World Airlines, Inc,* 504 US 374, 383; 112 S Ct 2031; 119 L Ed 2d 157 (1992), the United States Supreme Court concluded that, as used in a similar statute respecting the service of air carriers, the phrase

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[1] The entirety of this preemption provision is quoted in *In re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288, 293-294; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998).

"relating to" expressed a broad preemptive congressional purpose. See *In re Federal Preemption of Provisions of the Motor Carrier Act,* 223 Mich App 288, 300-301; 566 NW2d 299 (1997), lv den 458 Mich 852 (1998); *Fitzpatrick,* supra. *Morales*, p 384, determined that state laws having a "connection with" or "reference to" airline services were "related to" the federal act for purposes of preemption. See *Fitzpatrick*, p 692. Indeed, *Morales*, p 386, rejected the view that the federal act's preemptive scope is limited to state laws specifically addressed to the air carrier industry, ruling instead that a state law may be preempted even if it is not designed to affect the area of preemption or its effect on that area is only indirect.[2] *Morales* held, p 391, that a state law requiring truth-in-advertising of air fares was related to the price and service of carriers and was therefore preempted by the federal act. Accord *American Airlines, Inc* v *Wolens,* 513 US 219; 115 S Ct 817; 130 L Ed 2d 715, 724-725 (1995): state consumer fraud law is preempted where applied to rates and services of airline frequent-flyer programs. Thus, the *Fitzpatrick* court held, supra, that fidelity to the broad interpretation rendered by the United States Supreme Court in *Morales* required the conclusion that judicial enforcement of the Michigan Civil

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[2] On the other hand, *Morales,* p 390, left room for state actions "too tenuous, remote, or peripheral" to have preemptive effect – without, however, explaining what was meant by those terms of qualification or how they should be applied to "a borderline question." Rather, *Morales* said only that "we express no views about where it would be appropriate to draw the line." *Id,* quoting *Shaw* v *Delta Air Lines, Inc,* 463 US 85, 100 n 21; 103 S Ct 2890; 77 L Ed 2d 490 (1983).

Rights Act to protect against employment discrimination in the air carrier industry was likewise preempted.[3]

If federal legislation preempts some applications of the Michigan Civil Rights Act to the employment practices of air carriers in this state, as ruled in *Fitzpatrick*, then a fortiori the same preemptive effect of the FAAAA must apply to any economic regulation imposed on motor carriers by the MCA.[4] Thus, the question is whether the Michigan requirements challenged here, viz., the fees authorized by art IV, §§ 1 & 2 of the MCA, are manifestations of economic regulation. If so, they are preempted. If not, they may still be preempted if related, no matter how indirectly, to the price, route or service of a motor carrier. See *Morales,* supra, p 386. However, where such indirect relationship is "too tenuous, remote, or peripheral" to

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[3] That ruling was recently limited by *Gilman* v *Northwest Airlines, Inc*, 230 Mich App 293, 303-304; ___ NW2d ___ (1998), which held that the same federal statute does not preempt the Michigan Civil Rights Act prohibitions of age and sex discrimination because those employee characteristics have no apparent connection or relation to an airline's routes, prices or services. *Gilman*, at 298-300, distinguished *Fitzpatrick,* supra, which had dealt only with height and weight discrimination in employment.

[4] The PSC acknowledges such preemptive effect on specific provisions of the MCA and has ceased to enforce those sections it considers preempted. Thus, the PSC no longer requires applicants for certificates of authority to present evidence that their proposed service will serve a required public purpose without creating excess service. It no longer mandates that carriers avoid predatory pricing practices or file tariff schedules. Similarly, it no longer exercises its authority under the MCA to determine reasonable and sufficient rates, fares, charges and classifications or to penalize unlawful discrimination. See *In re Federal Preemption*, supra, p 297.

implicate preemption, the state legislation may be permitted to stand unaffected by the national policy of economic deregulation. *Id,* p 390.

While the tenuousness or peripherality of an "indirect relationship" has not been expressly addressed, there are some indications that it need not be particularly remote from the preempted field. For instance, in *American Airlines* v *Wolens,* supra, 130 L Ed 2d at 726 n 5, the United States Supreme Court endorsed the view that "the ban on enacting or enforcing any [state] law 'relating to rates, routes, or services' is most sensibly read, in light of the [federal law's] overarching deregulatory purpose, to mean 'States may not seek to impose their own public policies or theories of competition or regulation on the operation of an air carrier.'" That view was prefigured in *Morales,* supra, p 378, which recognized that the federal law was designed to place "maximum reliance on competitive market forces" under a uniform national regime of economic deregulation, i.e., "[t]o ensure that the States would not undo federal deregulation with regulation of their own." Thus, that federal enactment, as *American Airlines* stated at 728, "stops States from imposing their own substantive standards with respect to rates, routes, or services." That would suggest that the fees challenged here are not preempted by § 601 since they impose on motor carriers no particular "substantive standards" of competition or regulation.

The Commission's determinations regarding the effect of § 601 on the MCA were summarized recently in *In re Federal Preemption,* supra, p 295:

> "The PSC concluded that § 601 preempts only regulatory provisions concerning price, routes, and service – the essence of economic regulation.

> The PSC found it had substantial residual regulatory authority, including regulatory authority over matters such as safety. The PSC further concluded that it should continue a certification process (albeit, a 'streamlined' certification process) for intrastate motor carriers and that it could and should continue to assess statutorily mandated fees. . . . Since issuing its decisions, the PSC has ceased enforcing those provisions of the Motor Carrier Act that it concluded had been preempted."

Thus federal preemption under § 601 and the Commission's decisions applying that federal principle to the MCA have substantially altered the regulatory framework for the trucking industry in Michigan. *Id,* p 298.

Even so, the court in *In re Federal preemption,* p 301, ruled that much of the MCA survives the federal preemption statute:

> "[I]t is clear and unambiguous from the language of § 601 that the congressional intent was not to preempt all state regulation of the trucking industry. Section 601 expressly excepts from its preemptive effect significant aspects of regulation, including safety regulation, regulation of size and weight of vehicles, regulation of insurance requirements, and regulation of the transportation of household goods. If the language of a statute is clear and unambiguous, the plain meaning of the statute reflects the legislative intent. . . . Furthermore, the House Conference Report indicates that 'economic regulation' is intended to be preempted and that states retain their authority to regulate various aspects of the transportation industry. See H R Conf Rep No 677, 103d Cong, 2d Sess, pp 84-85. . . . The

> argument that Congress intended to preempt the entire field of regulation of motor carriers fails in the face of the language of the legislation and its history. The PSC's determination that § 601 was intended to preempt only economic regulation is consistent with the language and history of the legislation."

See also *Michigan Trucking Ass'n* v *Public Service Comm (On Remand)*, 225 Mich App 424, 427-429; 571 NW2d 734 (1997).

Significantly, the *Federal Preemption* court, pp 302-303, also rejected the contention reiterated by Plaintiffs here that federal preemption of all economic regulation means that the fees assessed under the MCA to finance that regulation must likewise be preempted, especially since the primary focus of the MCA had traditionally been economic regulation of the trucking industry:

> "Section 601 did not preempt the entire Motor Carrier Act. Section 601 of the FAAAA does not in its words indicate an intent to preempt fee provisions such as those challenged by these appellants. The legislative history reflects a contrary intent. The House Conference Report states that nothing in the legislation is intended to change the application of state tax laws to motor carriers. H R Conf Rep No 677, supra, p 85.
>
> "The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for

> administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules. Indeed, appellants . . . have not shown that the cost of the PSC's operations has ever been totally funded by the fees its [sic] collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulations."

The Court of Appeals has spoken. In two published decisions, *Federal Preemption* and *Michigan Trucking Ass'n*, supra, it has ruled that § 601 did not preempt the MCA in its entirety, and least of all in matters of safety regulation and the application and vehicle fees challenged here. That must be this Court's judgment as well. In short, Plaintiffs' motion based on the federal preemption claim must be denied.

SINGLE STATE REGISTRATION SYSTEM

Congress has provided for a Single State Registration System (SSRS) that requires a motor carrier having interstate authority to register annually with only one of the states among those it is authorized to provide transportation service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirements of all other states, except for a nominal fee "not to exceed $10 per vehicle" that is permitted annually to each participating state. The same section prohibits as an unreasonable burden on interstate commerce any other fee not in accordance with that specifically authorized.

Plaintiffs complain that the MCA violates the SSRS by its art IV, § 2(2) requirement of a $100.00 annual fee per vehicle that is registered in Michigan and operated entirely in interstate commerce by a Michigan-licensed motor carrier. Alternatively, they contend that § 2(2) is effectively preempted by the SSRS mandate that no participating state, other than the registering state, exact more than an annual fee of $10.00 per vehicle operated in interstate commerce. In either case, this MCA vehicle fee is supposedly rendered a nullity by the SSRS.

Of course, Michigan's MCA "applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12; MSA 22.545." *Federal Preemption,* supra, p 294. Here, however, there is no inconsistency. Section 2(2) of article IV of the MCA applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states," however, not on the "registering state." The SSRS neither prohibits nor preempts the Act's § 2(2) vehicle fee.

Moreover, the MCA expressly accommodates the fee system mandated by the SSRS. In article IV, section 7, MCL 478.7; MSA 22.566, the Act provides for the registration of and fees paid by carriers engaged in interstate transportation pursuant to the SSRS and any other reciprocal multistate agreement. In particular, subsection (4) mandates that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00." Obviously, that is perfectly consistent with the annual $10.00 vehicle fee permitted each participating

state by the SSRS. Plaintiffs' motion must therefore be denied.

COMMERCE CLAUSE

The dormant Commerce Clause of US Const, art I, § 8, prohibits a state from erecting barriers to the national regime of free trade by enacting tax or fee requirements that constitute an undue burden on or discrimination against interstate commerce. Plaintiffs assert that the MCA art IV, § 2(1) vehicle fee for intrastate Michigan transportation impermissibly discriminates against interstate motor carriers by favoring domestic carriers whose business is exclusively intrastate. This is supposed to be so essentially because domestic intrastate carriers necessarily derive a disproportionately greater financial advantage for their § 2(1) fees than do those interstate carriers that may want to make an occasional intrastate haul while their vehicles are visiting Michigan. The Court is not persuaded that the choice of whether to engage primarily in interstate rather than exclusively in intrastate transportation, made by private businesses competing in the free marketplace, affects Commerce Clause concerns. And it surely cannot result in the invalidation of § 2(1) on Commerce Clause grounds.

Plaintiffs cite *American Trucking Ass'ns* v *Scheiner*, 483 US 266, 282; 107 S Ct 2829; 97 L Ed 2d 226 (1987), for its condemnation of "flat taxes" whose unapportioned measure results in discrimination against some participants in interstate commerce in a manner that contradicts the purpose of the Commerce Clause. As *Goldberg* v *Sweet*, 488 US 252, 266; 109 S Ct 582; 102 L Ed 2d 607 (1989), explained, "In *Scheiner*, we held that Pennsylvania's flat

taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways." Here, the MCA intrastate vehicle fee is alleged to be just such a "flat tax" and therefore impermissible under the principles enunciated in *Scheiner*. Plaintiffs' reliance on *Scheiner* is misplaced.

First, the taxes at issue in that case were exacted for the purpose of financing roadway upkeep based on highway usage, but the flat tax on the privilege of operating on the state roads failed to take into account varying degrees of such usage by the different carriers. Here, however, the fee exacted is regulatory and intended "for administering the act." *Federal Preemption,* supra, p 302. Such state regulation as remains after federal preemption, including regulation of vehicular size and weight, insurance requirements and safety standards, is not amenable to a fee structure based on apportionment by usage rates. And the fee itself is plainly not a tax on the privilege of doing business in Michigan.[5] Thus, Commerce Clause interests are not affected by the intrastate vehicle fee.

Second, the flat taxes in *Scheiner* applied across the board to any vehicle traveling the state's highways,

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[5] It might also be pointed out that there is a distinction between a tax and a fee, although the *Scheiner* Court did not adhere to it. Neither did the Court of Appeals in *Federal Preemption,* supra at 302, quoted above in context, which spoke of the MCA fees as if they were nothing different from "the application of state *tax laws* to motor carriers." (Emphasis added.)

whereas the fee here is exacted only of those vehicles, foreign or domestic, that the carrier chooses to operate in point-to-point intrastate Michigan service. The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate service comply with MCA safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not have a prejudicial effect on interstate commerce and thus does not impact the Commerce Clause.

Third, *Scheiner* itself provides ample reason to think its principles are inapplicable to the intrastate vehicle fee of the MCA. There the Court found dispositive its precedents holding "that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *Id,* p 282 (footnote deleted). Stated more plainly, this principle applies only where foreign and domestic carriers are all competing in interstate commerce. Thus, Michigan cannot, consistent with the Commerce Clause, tax foreign carriers more heavily than domestic carriers engaged in interstate competition. It can, however, impose the identical vehicle fee of $100.00, as authorized by § 2(1), on all carriers that opt to provide intrastate Michigan transportation services. That fee does not implicate Commerce Clause concerns.

In short, the fee burden here does not fall more heavily on foreign carriers than on Michigan carriers engaged in interstate commerce. It is, rather, the same for all carriers that choose to provide intrastate Michigan haulage services either exclusively or in addition to

interstate operations. As was said in *Scheiner,* p 283, "the Commerce Clause is not offended when state boundaries are economically irrelevant." That is surely true of the § 2(1) intrastate vehicle fee based on Michigan boundaries, which have no economic relevance for interstate traffic. The motion challenging that fee on Commerce Clause grounds must therefore be denied.

The Court determines that Plaintiffs' motions for partial summary disposition are meritless. All three motions must therefore be denied. An order consistent with this opinion may enter upon its proper presentation.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

DATED: Oct. 13, 1998

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. **95-15628 CM**
Hon. James R. Giddings

TROY CAB, INC., et al,

Plaintiffs,

v

STATE OF MICHIGAN, et al

Defendants. /

File No. **94-15631 CM**
Hon. James R. Giddings

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ORDER

At a session of said Court, held in the Court of Claims on: November 12, 1998

PRESENT: _____

For the reasons stated in its October 13, 1998 Opinion, this Court hereby DENIES in their entirety Plaintiffs' First and Second Motions for Partial Summary Disposition filed on June 22, 1995 and June 22, 1995, respectively, and Intervening Plaintiff's Motion for Summary Disposition filed on June 30, 1995.

James R. Giddings
HONORABLE JAMES R. GIDDINGS
COURT OF CLAIMS JUDGE

A TRUE COPY
CLERK OF THE COURT
30TH JUDICIAL CIRCUIT COURT

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al.

Defendants. /

DOCKET NO. 95-15628-CM

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the City of Lansing on the 30th day of December, 1998.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on November 12, 1998 its Order denying Plaintiffs' First and Second Motions for Partial Summary Disposition and Intervening Plaintiffs' Motion for Summary Disposition for the reasons given in the Court's written Opinion of October 13, 1998; Defendants having renewed their Motion for Summary Disposition of all claims in their entirety by filing two supplemental briefs in support; the Court having reviewed the motion and the briefs of the parties in both consolidated actions having heard oral argument on the motion, and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendants' Motion for Summary Disposition is GRANTED. Plaintiffs and Intervening Plaintiffs in each case cannot prevail as a matter of law and both actions must therefore be DISMISSED for the reasons stated in Defendants' Second Supplemental Brief in Support of Defendants' Motion for Summary Disposition filed on November 10, 1998, and in the other briefs referred to therein.

IT IS SO ORDERED.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

A TRUE COPY
CLERK OF THE COURT
30TH JUDICIAL CIRCUIT COURT

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

MICHIGAN PUBLIC SERVICE COMMISSION, et al.

Defendants. /

DOCKET NO. 95-15628-CM

TROY CAB, INC., et al.,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs,

-vs-

STATE OF MICHIGAN, et al.,

Defendants. /

DOCKET NO. 95-15631-CM

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

At a session of said Court held in the City of Lansing on the 7th day of March, 2000.

PRESENT: HONORABLE JAMES R. GIDDINGS
Circuit Judge

The Court having entered on December 30, 1998 an order granting Defendants' renewed Motion for Summary Disposition and dismissing these consolidated complaints challenging the constitutionality of certain fees imposed on the trucking industry by Michigan law as administered by the Public Service Commission; Plaintiffs having filed a Motion for Reconsideration and brief in support; the Court having reviewed the motion and brief, and being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Reconsideration is DENIED, because it does not appear that the order of dismissal was erroneously entered. The motion does little more than rehash issues presented and decided earlier. "[A] motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." MCR 2.119(F) (3). Plaintiffs fail to demonstrate palpable error by which the Court has been misled. *Id.* Thus, there is no need to address each of Plaintiffs' renewed issues. The Court will comment, however, on the salient problems presented in the motion, principally those challenging the constitutionality of certain fees, identified and cited in the Court's written opinion of October 13, 1998, imposed on for-hire motor carriers by the Motor Carrier Act (MCA).

There is a presumption favoring the constitutionality of statutes. *McDougall* v *Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999); *H J Tucker & Associates, Inc* v *Allied Chucker & Engineering Co.* 234 Mich App 550, 556; 595 NW2d 176 (1999), lv den 461 Mich 944 (2000). Not only are statutes presumed constitutional but Michigan courts also have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Mahaffey* v *Attorney General,* 222 Mich App 325, 344; 564 NW2d 104 (1997). A successful challenge to the facial constitutionality of a statute must establish that there exist no circumstances under which the statute would be valid. *Council of Organizations & Others for Education About Parochiaid* v *Governor,* 455 Mich 557, 568 & 602; 566 NW2d 208 (1997), quoting *United States* v *Salerno,* 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Indeed, an interpretation of the Constitution that does not result in a statute being found invalid is preferred to one that does. *House Speaker* v *Governor,* 443 Mich 560, 585; 506 NW2d 190 (1993), quoting *Marbury* v *Madison,* 5 US (1 Cranch) 137, 175; 2 L Ed 60 (1803). Plaintiffs fail to overcome the presumption.

Accordingly, it is the Court's duty to determine whether the MCA is capable of *any* construction that would make it constitutional. *Michigan United Conservation Club* v *Dep't of Treasury,* ___ Mich App ___; ___ NW2d ___ (opinion by Judge Markey, docket 208429, issued December 10, 1999), slip opinion, p 4. Are the fees imposed on for-hire carriers by the MCA at odds with the plain language of the Constitution? The Court has already determined, by the order of December 30, 1998, that they are not. The same conclusion must prevail here.

Plaintiffs assert first that these fees are invalid and the Court must order that they be at least partially refunded because they are actually taxes that have not been properly adopted in accordance with the constitutional requirements. They contend that the fees are disproportionate to the necessary costs of regulating for-hire motor carriers, and that the moneys collected from the fees are largely used as general revenue to finance other aspects of government activity. They also point to *Yellow Freight System, Inc* v *Michigan,* 231 Mich App 194, 208; 585 NW2d 762 (1998), where the Court of Appeals opined that revenue collection "in the form of a fee" imposed by the MCA should be treated like "state tax cases" for purposes of 42 USC 1983 and the rule enunciated in *Nat'l Private Truck Council, Inc* v *Oklahoma Tax Comm,* 515 US 582; 115 S Ct 2351; 132 L Ed 2d 509 (1995). This Court, they suggest, should therefore treat these fees as if they were taxes. The Court disagrees.

There is no bright-line test for distinguishing a tax from a fee. *Bolt* v *City of Lansing,* 459 Mich 152, 160; 587 NW2d 264 (1998); *Graham* v *Kochville Twp,* 236 Mich App 141, 150; 599 NW2d 793 (1999). Whether the charges exacted for these applications and renewals of authority and for truck decals are properly characterized as fees or taxes requires consideration of several factors. *Bolt* at 161. No single factor is determinative of the distinction; rather, all factors should be considered in determining whether together they preponderate in one direction or the other. *Id.* at 163-169. Accord *Graham* at 151, citing *Bolt* at 167, n 16: "[T]hese criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee."

Generally, a fee is paid for a service rendered or a benefit conferred where there is "some reasonable relationship" between the amount of the fee and the value of the service or benefit, whereas a tax is meant simply to raise revenue. *Bolt* at 161, quoting *Saginaw Co* v *John Sexton Corp of Michigan,* 232 Mich. App 202, 210; 591 NW2d 52 (1998). Exactions imposed primarily for public rather than private purposes are taxes; the revenue raised by taxes inures to the benefit of all, as opposed to fees paid by a few for benefits that inure to the persons or group assessed. *Id.,* citing *Bray* v *Dep't of State,* 418 Mich 149, 162; 341 NW2d 92 (1983), which quoted *Dukesherer Farms, Inc* v *Dep't of Agriculture (After Remand),* 405 Mich 1, 15-16; 273 NW2d 877 (1979).[1]

Three criteria apply to the distinction between a fee and a tax. The first criterion requires that a fee serve a regulatory rather than a revenue-raising purpose. *Bolt, supra,* citing *Merrelli* v *St Clair Shores* 355 Mich 575, 583-584; 96 NW2d 144 (1959), which quoted *Vernor* v *Secretary of State,* 179 Mich 157, 167-170; 146 NW 338 (1914).[2] The

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[1] This "factor" can be confusing if it is mistakenly thought to require that the moneys acquired from fees never be used to benefit the public. On the contrary, regulatory fees such as those at issue here are an exercise of the police power of the community whose purpose is the protection of the public health, safety and welfare. Indeed, "such moneys are incidental to the accomplishment of the primary purpose of guarding the public." *Merrelli* v *St Clair Shores,* 355 Mich 575, 583; 96 NW2d 144 (1959).

[2] Citing the same precedent, *Graham, supra,* recently qualified the first criterion by saying that a fee can have a secondary revenue-raising purpose without having to treat the fee as a tax: "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." That principle applies here.

second criterion requires that a fee be proportionate to the necessary cost of the benefit or service provided. *Id.* at 162, citing *Merrelli, supra,* and *Bray, supra* at 160, and quoting *Vernor, supra* at 167. The third criterion requires that a fee be characterized by some degree of "voluntariness" in that those who pay it be able to refuse or limit their use of the benefit or service. *Id.* at 162-163, citing *Ripperger* v *Grand Rapids,* 338 Mich 682, 686; 62 NW2d 585 (1954), which quoted *Jones* v *Detroit Water Comm'rs*, 34 Mich 273, 275 (1876).[3]

The challenged fees are not unlawful taxes. As was summarized in *Bolt, supra* at 162, quoting *Vernor, supra* at 167:

> "'To be sustained [as a regulatory fee], the act we are here considering must be one for regulation only, and not as a means of producing revenue. Such a measure will be upheld by the courts

[3] But see *Bolt* v *City of Lansing (On Remand),* 238 Mich App 37, 45-48; ___ NW2d ___ (1999), where it appears that confusion over the historic import of these factors persists. This Court agrees with Judge Markman's dissent, pp 67-71, pointing out that the Supreme Court in *Bolt, supra,* relied on long-established precedent in distinguishing fees from taxes and did not create some "new" test of the difference between them. This Court also agrees with the dissent, at 71, when it says, "in virtually all such disputes, the application of a 'totality of factors' test will inevitably entail some uncertainty in terms of the ultimate result, while also affording both sides some measure of reasonable argument." That, however, puts the Markman dissent in close proximity to that in *Bolt* at 176, where Justice Boyle expressed strong doubt, shared by this Court, that the "test" is straightforward and consistent enough to be applied with any degree of precision to this "legal conundrum." But perhaps that should go without saying where the test is admittedly not one of "bright lines" – which is, incidentally, one reason for the *Bolt* decision having split 4:3.

> when plainly intended as a police regulation, and the revenue derived therefrom is not disproportionate to the cost of issuing the license, and the regulation of the business to which it applies.'" (Brackets in original.)

In *Merrelli, supra* at 583-584, quoting *Vernor, supra* at 168, the proportionality of a fee was linked to its presumed reasonability:

> "'[W]hat is a reasonable fee must depend largely upon the sound discretion of the legislature, having reference to all the circumstances and necessities of the case. It will be presumed that the amount of the fee is reasonable, unless the contrary appears upon the face of the law itself, or is established by proper evidence. . . .
>
> "'In determining whether a fee required for a license is excessive or not, the absence or amount of regulatory provisions and the nature of the subject of regulation should be considered, and, if the amount is wholly out of proportion to the expense involved, it will be declared a tax. * * * '" (Cites deleted.)

As *Vernor* also said at 168, in important language not quoted in *Merrelli,* "If revenue is incidentally derived which is not so disproportionate as to make the fee charged unreasonable, there can be no objection." Accord *Graham, supra* (see footnote 2). That is the case here.

The Court determines that the MCA fees are not "wholly out of proportion to the expense involved" in the Commission's regulation of the motor carrier industry. The revenue incidentally derived therefrom, even if in excess of the necessary costs of regulation, is not so disproportionate as to render these fees unreasonable – especially since

they are supportive of the underlying regulatory purpose. *Graham, supra.* Payment of the fees is not compulsory inasmuch as carriers choose just how much of a presence in Michigan, if any, they want their trucks to have. Consistent with the criteria set out in *Bolt, supra* at 161-162, these fees serve a regulatory purpose, are proportionate to the necessary costs of the regulatory service and are voluntary. Compare *Graham, supra* at 152-156. The Court must therefore defer to the sound discretion of the legislature in deciding what MCA fees would be reasonable. In short, these fees are not taxes and Plaintiffs are therefore not entitled to a refund.

Second, Plaintiffs assert that the challenged fees are facially infirm for their disparate treatment of for-hire motor carriers relative to all other motor carriers that regularly travel Michigan highways. On this view, since the latter group is not subject to the imposition of MCA fees there can be no rational basis for such dissimilar treatment of motor carriers. Saying that "[t]he classification made by the [MCA] is arbitrary and discriminates against for-hire motor carriers," Plaintiffs complain that the MCA denies them equal protection of the law by requiring that only they, and not private or exempt carriers, pay for police enforcement of safety provisions applicable to the entire trucking industry. Indeed, "There is no difference between for-hire motor carriers, on the one hand, and private and exempt carriers, on the other hand, in terms of the safety concerns that they pose to the traveling public . . . [or] of the amount of police enforcement required to see that they are complying with the law . . . [or] of the amount of damage caused by such carriers to the state and federal highways." Pointing out that the for-hire carriers "have exactly the same interest as private

carriers in operating their equipment in a safe fashion," Plaintiffs conclude that imposition of these fees on only the former must be "irrational," "arbitrary" and "discriminatory," and therefore must offend equal protection of the law principles.

This view fails to see, however, that the process of drawing lines and distinguishing between kinds of motor carriers for regulatory purposes is a legislative task of identifying priorities, weighing relevant considerations and choosing among competing alternatives. Equal protection guarantees do not require that such distinctions be ideal: "'[T]he drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.'" *O'Donnell* v *Farm Mutual Automobile Ins Co,* 404 Mich 524, 542; 273 NW2d 829 (1979), app dis 444 US 803 (1980), quoting *Massachusetts Bd of Retirement* v *Murgia,* 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976), and *Ohio Bureau of Employment Services* v *Hodory,* 431 US 471, 489; 97 S Ct 1898; 52 L Ed 2d 513 (1977).

Nor does equal protection require the legislature to deal with every aspect of the problems presented in motor-carrier regulation at the same time. A statute is not unconstitutional merely because it might have gone further than it did by solving all such problems at once. The legislature need not simultaneously "strike at all evils" associated with such regulatory problems; rather, the measure adopted "'may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* at 543, quoting *Katzenbach* v *Morgan,* 384 US 641, 657; 86 S Ct 1717; 16

L Ed 2d 828 (1966), and *New Orleans* v *Dukes,* 427 US 297, 305; 96 S Ct 2513; 49 L Ed 2d 511 (1976). All that need be shown is that there was a rational basis for the particular lines that were drawn. If so, the legislative judgment must then be sustained. *Id.* "The mere fact that the Legislature has chosen to draw a distinction; between for-hire and private motor carriers for purposes of this kind of regulation "does not mean that [the MCA] is unconstitutional." *Id.* at 547. See also *In re Forfeiture of $109,901,* 210 Mich App 191, 197; 533 NW2d 328 (1995).

Plaintiffs are not members of a protected class and fundamental rights are not implicated in these consolidated actions. This equal protection claim must therefore be assessed by means of a rational basis test. *Saginaw Co, supra* at 222-223, citing *Yaldo* v *North Pointe Ins Co,* 457 Mich 341, 349; 578 NW2d 274 (1998). Michigan courts must uphold the challenged statute where it furthers a legitimate governmental interest and the classification is rationally related to achieving that interest. *Id.* at 223. This requires only that the legislation's distinctions bear a reasonable relationship to a permissible legislative objective. *Pioneer State Mutual Ins Co* v *Allstate Ins Co.* 417 Mich 590, 599-600; 339 NW2d 470 (1983). There need only be some reason for thinking that the means chosen, i.e., the statute's distinctions, are likely to further the legislature's goals. *Doe* v *Dep't of Social Services,* 439 Mich 650, 662; 487 NW2d 116 (1992), citing *Shavers* v *Attorney General,* 402 Mich 554, 613; 267 NW2d 72 (1978), cert den 442 US 934 (1978).

The application and renewal fee and the intrastate and interstate decal fees required by the MCA reflect the legislature's intent to regulate the non-preempted aspects

of the for-hire motor carrier industry remaining after federal preemption of the economic aspects. It surely was not unreasonable for legislators to think that industry in a materially different position relative to the public interest than private carriers. That distinction rationally comports with the legislative intent to subject the former to regulation for the sake of guarding the public. Whether that means to securing the public interest actually works out as intended is another question that is of no concern to equal protection analysis. *O'Donnell, supra* at 549.

Further, the legislature's statutory distinction between commercial and private motor carriers for the purpose of exacting these fees is a valid classification designed to address the specific concerns of this legislation. The objective is without doubt a legitimate state interest, and there is nothing unreasonable or irrational about the classification scheme's relationship to that goal. The fees are not arbitrary since they represent a reasonable effort by government to assure that the public is adequately protected against potential dangers posed by for-hire carriers. Although the lines drawn by the legislature in making the MCA applicable only to commercial carriers may be imperfect, that is not sufficient to render them unconstitutional. "'That the legislative solution appears undesirable, unfair, unjust or inhumane does not of itself empower a court to override the legislature and substitute its own solution.'" *Doe, supra* at 681, quoting *Manistee Bank & Trust Co* v *McGowan,* 394 Mich 655,

666-667; 232 NW2d 636 (1975). In short, the challenged fees do not violate equal protection of the law.[4]

The Court will address next one facet of the federal preemption issue[5] that inadvertently went untreated in the written opinion of October 13, 1998. There, at 11, this Court ruled that the Single State Registration System (SSRS), 49 USC 11506, now 49 USC 14504, neither preempted nor prohibited the § 2(2) per-vehicle interstate decal fee of $100 imposed by the MCA. The Court reaffirms that ruling and now considers Plaintiffs' contention that, even if that is correct (which they dispute), the same fee had been preempted or prohibited long before Congress adopted the SSRS in 1991 and the Interstate Commerce Commission (ICC) implemented it in 1994. Specifically, they argue that certain pre-SSRS regulations of the ICC had imposed an absolute limit, "not to exceed" $5 at one time and $10 later, on all interstate decal fees, including those required by the state that registers and licenses a motor carrier's vehicles. This Court disagrees.

Neither before implementation of the SSRS nor after did the Congress or the ICC impose a ceiling on the fee that a registration state may charge for per-vehicle interstate decals. The fee limits that were imposed applied only to states where the vehicles were not based and registered.

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[4] Given the Court's disposition of the first two issues, there is no need to treat Plaintiffs' third issue based on 42 USC 1983. That is so because § 1983 is merely a vehicle for the vindication of viable claims, and here no such claim remains.

[5] For a summary of preemption principles, see *Walker* v *Johnson & Johnson Vision Products, Inc,* 217 Mich App 705, 710-713; 552 NW2d 679 (1996).

The case vaunted by Plaintiffs as providing "an excellent educational discussion of federal law both prior to and after implementation of the SSRS," *Nat'l Ass'n of Regulatory Utility Comm'rs* v *Interstate Commerce Comm.*, 309 US App DC 325; 41 F3d 721, 724 (1994), says nothing different.[6] Indeed, it does not even touch on the issue but does stress that it was the congressional intent in establishing the SSRS not only "'to benefit the interstate carriers by eliminating unnecessary compliance burdens'" but also "'to preserve revenues for the states [like Michigan] which had participated in the bingo [card/stamp] program'" of interstate reciprocity under regulation by the ICC. *Id.*, quoting H R Conf Rep No 102-404, 102d Cong, 1st Sess, 437 (1991).

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[6] As to the SSRS, the same case points out at 725 that Congress distinguished the registration state from the participating states:

> "The 'registration state' may require applicants to submit evidence that they have been certified by the ICC, that they are properly insured, and that they have a local agent available for service of process .... The registration state also collects and distributes per-vehicle fees for those other states participating in the 'single-state' system through which the carrier seeks to run its vehicles.... Participation is limited under the statute to the 39 states that had earlier elected to join the 'bingo stamp' program.... Each of these states may charge carriers an amount 'equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991,' ...: and the registration state must 'issue a receipt ... reflecting that the carrier has filed proof of insurance ... and has paid fee amounts in accordance with the fee system established,' ... " (Cites deleted.)

The *Nat'l Ass'n* court scrupulously followed this distinction throughout its opinion. This Court has done the same here.

In particular, the ICC regulation at issue, 49 CFR 1023.33, remained substantially unchanged from 1982 through 1992 when the agency began its rulemaking implementation of the SSRS. Throughout that period it is clear that the regulation and its fee limitation applied only to those states requiring "identification stamps" or an identification number for each vehicle not registered or licensed by such states. It did not apply to the state of registration. The § 2(2) per-vehicle interstate decal fee of the MCA is imposed only where Michigan is the state of registration and licensing. It was therefore not preempted or proscribed by federal law either before or after implementation of the SSRS. In short, Plaintiffs are not due any refund.

Finally, Plaintiffs assert that the Court must grant reconsideration in light of *Yellow Freight, supra*, which they say "is dispositive as to certain critical issues in the instant case." It appears, however, that the only issues presented here that *Yellow Freight* disposed of dealt with remedies, whereas Plaintiffs have no remedy in this matter because they cannot prevail on the merits. *Yellow Freight* held that the state had collected SSRS fees pursuant to § 7(4) of the MCA in excess of the amount allowed by the SSRS and that the excess amount had to be refunded. But none of the Plaintiffs in this action, including those named in the Troy Cab complaint, challenges fee collection under § 7(4) on that specific ground. They allege, rather, that such $10 fee assessed against carriers registered and licensed not by Michigan but by the other participating states is somehow "inconsistent" with the

SSRS requirements – but without spelling out the precise inconsistency implicated in *Yellow Freight*.[7] It follows that *Yellow Freight* does not govern here. Plaintiffs do not challenge § 7(4) based on any inconsistency with the SSRS stemming from the changed method, implemented by the PSC in 1992, for determining reciprocity among the states.

The Court determines that its order of December 30, 1998 was not erroneously entered. The challenged MCA fees are not unlawful taxes and do not violate equal protection guarantees. Plaintiffs therefore have no remedy, either in the form of refunds or as equitable relief pursuant to § 1983, because as previously ruled they

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[7] The inconsistency identified in *Yellow Freight*, p 198, has not been put in contention here:

> "For the 1991 and 1992 registration years, the state collected fees by requiring interstate carriers to buy cab card stamps, also known as 'bingo stamps,' for each of the carrier's vehicles operating within the state. Each stamp cost $10. Pursuant to MCL 478.7(4); MSA 22.565(1) (4), the state had reciprocity agreements with certain other states so that each would waive the fees for vehicles from the other. The dispute arises in part because *the state changed the method it used for determining reciprocity*. For 1991, the state used the 'base-plating system,' which means that reciprocity was determined by the state of the vehicle's registration. In early 1991, the Public Service Commission (PSC) decided that it would quit using the base-plating system. Instead, for the 1992 registration year, fees and reciprocity were determined by the carrier's principal place of business." (Emphasis added.)

As a result of this change of method, the plaintiff paid Michigan about $37,800 more under the new system than it had under the old, a "substantial increase in fees" that clearly violated the SSRS. *Id.* at 198-199.

cannot prevail on the merits. The Plaintiffs' Motion for Reconsideration must therefore be denied.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's written opinion of October 13, 1998, which is incorporated herein by reference, is CONFIRMED. The challenged MCA fees were not preempted by federal legislation and regulations. In particular, the § 2(2) per-vehicle interstate decal fee of $100 was not preempted or prohibited by federal law either before or after implementation of the SSRS where the vehicle's "registration state" is Michigan and where the vehicle is operated entirely in interstate commerce by a Michigan-licensed commercial motor carrier. By the same token, the § 2(1) per-vehicle intrastate decal fee of $100 did not violate the dormant Commerce Clause since it could not impermissibly discriminate against interstate motor carriers where the fee is based purely on Michigan boundaries having no economic relevance for interstate traffic. The challenged fees are constitutional and need not be refunded.

IT IS FURTHER ORDERED AND ADJUDGED that this is the final order of the Court and these consolidated cases are hereby DISMISSED.

IT IS SO ORDERED.

/s/ James R. Giddings
JAMES R. GIDDINGS
Circuit Judge

APPENDIX C

Order **Michigan Supreme Court**
Lansing, Michigan

Entered: December 3, 2003

Maura D. Corrigan,
Chief Justice

123562-5

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING INC., and BEST WAY EXPRESS, INC.,
Plaintiffs-Appellants,

and

SC: 123562-3
COA: 226052, 226122
Court of Claims:
95-015628-CM

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,
Defendants-Appellees.

/

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY, AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES, INC., and OJ TRANSPORT, INC.,
Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,
Intervening Plaintiffs-Appellees,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,
Defendants-Appellees.

SC: 123564-5
COA: 226053, 226137
Court of Claims: 95-015631-CM

_____/

On order of the Court, the application for leave to appeal the March 11, 2003 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(LOGO) I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 3, 2003 /s/ Corbin R. Davis

APPENDIX D

49 U.S.C. §11506 (1988 ed.)

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
[PARTIAL REVISION]
SUBTITLE IV – INTERSTATE COMMERCE
CHAPTER 115 – FEDERAL-STATE RELATIONS

§ 11506. Registration of motor carriers by a State

(a) In this section, "standards" and "amendments to standards" mean the specification of forms and procedures required by regulations of the Interstate Commerce Commission to prove the lawfulness of transportation by motor carrier referred to in section 10521(a)(1) and (2) of this title by –

(1) filing and maintaining certificates and permits issued to the motor carrier by the Commission;

(2) registering motor vehicles operating under the certificates and permits;

(3) filing and maintaining proof of required insurance coverage or qualification as a self-insurer; and

(4) filing the name of a local agent for service of process.

(b) The requirement of a State that a motor carrier, providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and providing transportation in that State, register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under

standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

(c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. If the national organization determines to withdraw entirely standards prescribed by the Commission, the Commission shall prescribe new standards by the end of the first year after the national organization determines to withdraw the standards.

(2) An amendment to the standards prepared and certified by the national organization and prescribed by the Commission is effective when the amendment is prescribed or at another time as determined by the national organization.

(d) The national organization shall consult with the Commission and representatives of motor carriers subject to the State registration requirement when preparing amendments to the standards. Different amendments may be prescribed for each class of motor carriers as warranted by the differences in the operations of each class.

(e) This section does not –

(1) authorize standards in conflict with regulations of the Commission; or

(2) affect the authority of the Commission to interpret its regulations and certificates and permits issued under section 10922 or 10923 of this title.

49 U.S.C. §11506 (1994 ed.)

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE IV – INTERSTATE COMMERCE
CHAPTER 115 – FEDERAL-STATE RELATIONS

§ 11506. Registration of motor carriers by a State

(a) Definitions. – In this section, the terms "standards" and "amendments to standards" mean the specification of forms and procedures required by regulations of the Interstate Commerce Commission to prove the lawfulness of transportation by motor carrier referred to in section 10521(a)(1) and (2) of this title.

(b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and providing transportation in that State, register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.

(c) Single State registration system. –

(1) In general. – Not later than 18 months after the date of the enactment of the Intermodal Surface Transportation Efficiency Act of 1991, the Commission shall prescribe amendments to the standards existing as of such date of enactment. Such amendments shall implement a system under which –

(A) a motor carrier is required to register annually with only one State;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of certificate; proof of insurance; payment of fees. – Under the amended standards implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –

(i) to file and maintain evidence of such certificate or permit;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – Such amended standards –

(i) shall require that the registration State issue a receipt, in a form prescribed under the amended standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining a certificate or permit under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

(D) Limitation on participation by States. – Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection.

(3) Effective date of amendments. – Amendments prescribed under this subsection shall take effect by January 1, 1994.

(d) Interpretation authority of Commission. – This section does not affect the authority of the Commission to interpret its regulations and certificates and permits issued under section 10922 or 10923 of this title.

49 U.S.C. §14504 (2000 ed.)

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE IV – INTERSTATE TRANSPORTATION
PART B – MOTOR CARRIERS, WATER CARRIERS, BROKERS, AND FREIGHT FORWARDERS
CHAPTER 145 – FEDERAL-STATE RELATIONS

§ 14504. Registration of motor carriers by a State

(a) Definitions. – In this section, the terms "standards" and "amendments to standards" mean the specification of forms and procedures required by regulations of the Secretary to prove the lawfulness of transportation by motor carrier referred to in section 13501.

(b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

(c) Single State registration system. –

(1) In general. – The Secretary shall maintain standards for implementing a system under which –

(A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of Federal registration; proof of insurance; payment of fees. – Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part –

(i) to file and maintain evidence of such Federal registration;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – The standards of the Secretary –

(i) shall require that the registration State issue a receipt, in a form prescribed under the standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

(D) Limitation on participation by States. – Only a State which, as of January 1, 1991, charged or collected a fee for a vehicle identification stamp or number under part 1023 of title 49, Code of Federal Regulations, shall be eligible to participate as a registration State under this subsection or to receive any fee revenue under this subsection.

Mich. Comp. Laws Ann. §478.2 (West 2002)

MICHIGAN COMPILED LAWS ANNOTATED
CHAPTERS 475 TO 479. MOTOR CARRIER ACT
THE MOTOR CARRIER ACT
ARTICLE IV. FEES

478.2. Annual administration fee; replacement identification fee; temporary permit fee; operation without payment of fees; extensions; payment of fees at single designated location

Sec. 2. (1) In addition to the license fees or taxes otherwise imposed upon motor carriers, there shall be assessed against and collected from each motor carrier for the administration of this act, an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier, except as otherwise provided in this subsection. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier, if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle. After payment of the $100.00 annual fee for a motor vehicle, or the $50.00 fee paid for a vehicle operated after June 30, or the $50.00 fee paid for a vehicle used for the transportation of household goods if a motor carrier seeks to begin operating a self-propelled motor vehicle in place of another motor vehicle not leased to the motor carrier by an owner operator for which a fee was paid and surrenders the identification allocated to the motor vehicle by the commission, accompanied by a fee of $10.00, a replacement identification shall be issued. If the owner operator replaces a vehicle while it is still leased to the same motor carrier to whom it was leased when the identification was issued, the replacement identification fee shall be $10.00. For all other replacement vehicles, the fee shall be $25.00

for each complete or partial calendar year quarter remaining in the year as of the date the replacement vehicle is to begin operating upon surrender of the identification allocated to the motor carrier by the commission. For each truck or tractor used exclusively for the transportation of household goods as defined by the commission, the annual fee shall be $50.00.

(2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

(3) The commission may issue a temporary 72-hour permit for the operation of a vehicle subject to rules and conditions of the commission at a fee of $10.00, which is in place of any other fee otherwise required under this section. The commission shall reserve the authority to deny or curtail the use of temporary permits authorized by this section.

(4) A motor carrier shall not operate any motor vehicle upon or over the highways of this state, except as otherwise provided in this act, while any of the fees imposed by this act remain unpaid. The commission is prohibited from extending the time of payment or permitting the operation while the delinquency continues.

(5) Motor carriers subject to this act shall not be required to pay the fee on operations of vehicles within the area described in section 2(1)(a) of article V.

(6) The commission shall cooperate with other state departments involved with the registration of commercial motor vehicles to implement a system whereby owners or drivers of commercial motor vehicles can obtain registration plates, decals, or tabs and pay the required fees at a single designated location, rather than at multiple locations.

(2)

03-1234

Supreme Court, U.S.
FILED
MAY 3 - 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
and LAFOND EXPRESS, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, ET AL

Respondents.

On Petition For Writ of Certiorari
To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under MCL 478.2(2), motor carrier vehicles base-plated in Michigan that engage entirely in interstate commerce pay an annual fee of $100 for the administration of the Michigan Motor Carrier Act and other Acts related to the safety of Michigan's highways. Petitioners assert that MCL 478.2(2) is preempted by 49 USC 11506 that provides for the annual registration of a federal certificate and proof of insurance. Based on the record before it, the Michigan Court of Appeals found the $100 fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the Michigan Motor Carrier Act, particularly covering costs of enforcing safety regulations.

The questions presented are:

Whether the Michigan Court of Appeals correctly concluded that the $100 fee required by MCL 478.2(2) for interstate vehicles that are licensed in Michigan was not preempted by federal law.

Where the Petitioners failed to present evidence to support their claims, did the Michigan Courts properly grant summary disposition against them?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanderkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

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The opinion of the Michigan Court of Appeals (Pet. App. 1-35) is reported as *Westlake Transportation, Inc v Michigan Public Service Comm*, 255 Mich App 589; 662 NW2d 784 (2003). The trial court rulings (Pet. App. 36-72) and the judgment of the Michigan Supreme Court denying leave to appeal (Pet. App. 73-75) are all unreported.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art VI, cl 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . shall be the supreme Law of the Land. . . and the judges in every State shall be bound thereby, anything in the Constitution or the Law of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

MCL 478.2(2) provides:

(2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

Relevant statutory provisions reproduced in the Appendix are 49 USC 11506 (1988 ed) (repealed) (Pet. App. 76-77); 49 USC 11506 (1994 ed) (repealed) (Pet. App. 78-81); and 49 USC 14504 (2000 ed) (Pet. App. 82-85).

STATEMENT

1. Statutory Framework

Since 1933, motor carrier regulation in Michigan has been under the Michigan Motor Carrier Act (MCA), MCL 475.1, *et seq*. Under the MCA, most motor carriers are required to pay an annual fee of $100 per vehicle for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor carrier vehicles base-plated in Michigan that engage entirely in interstate commerce. Interstate vehicles base-plated outside of Michigan are charged a fee of up to $10 for registering their Interstate Commerce Commission[1] (ICC) certificate and proof of insurance. MCL 478.7.

[1] Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC 113(f)(1) [49 USCS 113(f)(1)].

Petitioners claim that MCL 478.2(2) is preempted by the federal Single State Registration System (SSRS), 49 USC 11506[2], and federal regulations. In the SSRS, Congress provided that a motor carrier having interstate authority must annually register its federal certificate and proof of insurance with only one of the states where it is authorized to provide service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirement of all other states, except for a nominal fee of "not to exceed $10 per vehicle" that is permitted to be charged by each state participating in the SSRS. The scope of the standards authorized by 49 USC 11506 relate to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. See, 49 USC 11506(a). The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of insurance; and (4) filing the same of a local agent for service of process. 49 USC 11506(b) further provides that it is not an unreasonable burden for a state to require a motor carrier subject to ICC jurisdiction to register with that state.

The Michigan Court of Claims, the Michigan Court of Appeals, and the Michigan Supreme Court have all considered Petitioners' claim that the limitation of § 11506 on registration fees also limits the regulatory fees under MCL 478.2(2). None of these courts have found any merit to Petitioners' claims.

2. Court Proceedings

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the

[2] This statute is currently codified as 49 USC 14504; however, Respondents will refer to the law as § 11506.

MCA. These cases were certified as a class action on June 9, 1995.

On June 22, 1995, Westlake Transportation, Inc. filed a motion for partial summary disposition asserting that MCL 478.2(2) was preempted by 49 USC 11506. On October 13, 1998, the Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denied the motion (Pet. App. 36-50). On December 30, 1998, the Court granted the State Defendants' Motion for Summary Disposition (Pet. App. 54-56). On March 7, 2000, the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 57-77). Petitioners filed a claim of appeal with the Michigan Court of Appeals on March 24, 2000.

b. Michigan Court of Appeals.

On March 11, 2003, the Court of Appeals issued its opinion in the consolidated appeals and affirmed the Court of Claims summary disposition ruling in favor of the State Defendants. The Court stated:

> Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state, [fn with text of MCL 478.7 is omitted] and asserts that motor carriers registered in Michigan are required to be charged similarly.
>
> * * *
>
> [T]he key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations which interpret it.
>
> * * *

> We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.
>
> The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, such that it is subject to the limitation in § 11506, or a regulatory fee. . . .
>
> We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations. [fn concerning waiver of fee is omitted] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in MCL 487.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Petitioners filed an Application for Leave to Appeal with the Michigan Supreme Court on April 1, 2003.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the applications for leave (Pet. App. 74-75).

REASONS FOR DENYING THE PETITION

A. The Michigan Motor Carrier Act's fee provisions are not preempted by federal law.

1. Introduction.

Under MCL 478.2(2), motor carrier vehicles that are base-plated in Michigan and engage entirely in interstate commerce are assessed an annual fee of $100 for the administration of the MCA. Petitioners claim that MCL 478.2(2) is preempted by 49 USC 11506 and federal regulations. In the SSRS, Congress provided that a motor carrier having interstate authority must annually register its ICC authority and proof of insurance with only one of the states where it is authorized to provide service. Under § 11506, this single registration is deemed to satisfy the registration requirement of all other states, except for a nominal fee of "not to exceed $10 per vehicle" that is permitted to be charged by each participating state.

The scope of the standards authorized by § 11506 relate only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of insurance; and (4) filing the name of a local agent for service of process. Section 11506(b) further provides that it is not an unreasonable burden for a state to require a motor carrier subject to ICC jurisdiction to register with that state.

The fundamental flaw in the Petitioners' argument is that the *regulatory* fee provided for in MCL 478.2(2) is not a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured or that it has a named agent for service of process. Rather, the fee supports the enforcement of the MCA; the Motor Carrier Safety Act, MCL 480.11, *et seq*; the Michigan Vehicle Code, MCL 257.1, *et seq*; size and weight regulation; and other laws governing commercial motor vehicles and motor

carriers.[3] Hence, it is a fee to cover the cost of regulation and is not the type of fee addressed by § 11506.

2. MCL 478.2(2) is not subject to federal preemption unless that is the clear and unequivocal intention of Congress.

Petitioners claim MCL 478.2(2) has been preempted by federal law. In addressing this preemption claim, the Michigan Court of Appeals summarized the source and scope of federal preemption as follows:

> Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC § 11506. Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Kohynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co v Coyne*, 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).
>
> The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art 6, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & Eastern R Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999). Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law,

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[3] See September 14, 1995 Affidavit of Thomas R. Lonergan ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b).

(5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* (Pet. App. 6-7).

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369 (1986). Furthermore, as the U.S. Supreme Court noted in *Cipollone v Ligget Group, Inc,* 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained". *Florida Lime and Avocado Growers v Paul,* 373 US 132, 142 (1963). Significantly, an express intent to nullify a state regulatory program will not be lightly inferred. *Pacific Gas & Electric Co v California Energy Resources Conservation and Development Comm,* 461 US 190 (1983).

As discussed below, Petitioners have failed to carry their heavy burden to demonstrate that the regulatory fees collected pursuant to MCL 478.2(2) are preempted under these principles of constitutional law.

3. 49 USC 11506 does not preempt the fee charged under MCL 478.2(2).

49 USC 11506 provides, in relevant part, as follows:

(2) Specific requirements. –

(A) **Evidence of certificate; proof of insurance; payment of fees.** – Under the amended standards implementing the single State registration system

described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –

(i) to file and maintain evidence of such certificate or permit;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) **Receipts; fee system.** – such amended standards –

* * *

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

The scope of the standards authorized by § 11506 relates only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of

insurance; and (4) filing the name of a local agent for service of process.

Consistent with § 11506, interstate vehicles base-plated outside of Michigan are charged a fee of up to $10 for registering their ICC certificate and proof of insurance. MCL 478.7. However, if an interstate vehicle is base-plated in Michigan, then MCL 478.2(2) is applicable, which provides as follows:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

The *regulatory* fee provided for in MCL 478.2(2) is not just a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured, or that it has a named agent for service of process. Rather, the fee under MCL 478.2(2) supports the MCA; the Motor Carrier Safety Act, MCL 480.11, *et seq*; the Michigan Vehicle Code, MCL 257.1, *et seq*; and the Fire Prevention Act, MCL 29.1, *et seq*.[4] Section 11506 seeks to provide the motor carrier with the benefit of registering their ICC authority in one state, for each of the states for which they have authority. Thus, MCL 478.2(2) literally is not within the preemptive scope of § 11506.

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[4] See September 14, 1995 Affidavit of Thomas R. Lonergan ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b).

Petitioners' reliance on the language in 49 USC 11506(b) is misplaced. That provision states: "When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden." The reference to 'State registration requirement' relates to the registration by a motor carrier of their ICC authority. It is wholly unconnected to the base-plated registration which is based on a state's motor vehicle code or the international registration plan. This distinction is further evident when one reviews the fee system utilized for the SSRS. The fee system is based on the number of commercial motor vehicles the carrier operates in a State, which is not to exceed $10.00 per vehicle. In contrast, the licensing/plating registration of a motor vehicle is usually based on the weight of a vehicle. (See MCL 257.801(1)(j) or MCL 257.801(1)(k) or MCL 257.801g).

The MCL 478.2(2) regulation fee is not encompassed within the limitations of § 11506.

4. Federal regulations do not preempt MCL 478.2(2).

Petitioners claim that certain pre-SSRS federal regulations imposed an absolute limit, "not to exceed" $5 initially and later $10, on all interstate decal fees, including those required by the state that registers and license plates a motor carrier's vehicles.

The federal registration and identification standards that Petitioners allege preempt MCL 478.2(2) simply do not purport to preempt state *regulatory* fees.

By their terms, the standards apply only when a state requires that a motor carrier "file and maintain a current record of its authority issued by the Interstate Commerce Commission" (49 CFR 1023.11); "designate a local agent for service of process..." (49 CFR 1023.21); or "identify its vehicles as operating under its ICC authority." (49 CFR 1023.31). As for 49 CFR 1023.32(a) and 1023.33 these regulations provide, in pertinent part, that:

> [a] motor carrier shall apply to [a] State for the issuance of an identification stamp or stamps.... For the registration and identification of the vehicle or vehicles which it intends to operate . . . within the borders of such State. . .
>
> * * *
>
> The application ... shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10.00 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps) that such fee shall not exceed $10.00 for each vehicle operated under the authority of the motor carrier.

In affirming the Court of Claims on this issue, the Michigan Court of Appeals stated:

> The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8] Accordingly, the court did not err in granting defendants summary disposition.

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[8] We note that cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

In the foregoing circumstances, federal standards control and contrary state standards are preempted. None of these circumstances, however, relate to *regulatory* fees. In sum, nothing in the federal standards, their underlying statute, or

legislative history suggest that Congress intended to preempt the States in matters unrelated to proof of legality of interstate operations. A regulatory fee is simply not subject to preemption under the regulations cited by Petitioners.

5. Nothing in the legislative history evidences an intent of Congress that the registration standards authorized by 49 USC 11506 preempt state regulatory fees.

Section 11506 was amended in 1965 in response to a need to control illegal interstate for-hire trucking. Pub L 89-170, 79 Stat 648 (September 6, 1965). The House noted that such illegal operators represented a "continuing concern" and that despite past legislative activity, "illegal for-hire trucking continues to be a significant problem today". H R Rep No. 253, 89th Cong. 1st Sess., *reprinted in* 1965 USCCAN 2923, 2924. Much of the remedy for this problem was addressed by adoption of additional civil enforcement provisions to be used by the ICC. In addition, there was an acknowledgment that states had attempted to help control the problem by requiring registration of ICC authorized carriers, but there was no uniformity in such state requirements. Hence, uniformity would be required. *Id.* It was specifically noted that the federal standards to be adopted under 49 USC 11506 were "to evidence the lawfulness of interstate operations of a carrier within a state. . . ." *Id* at 2928.

There is no basis for the proposition that state regulatory fees were to be considered "proof of legality of interstate operations". Indeed, it was specifically noted that:

> the purpose of such registration is to enable state enforcement officials to identify motor carriers hauling, on a for-hire basis, commodities subject to regulation and thus take on-the-spot action against those who have not the authority to do so. This, in effect, means that we want to encourage the states in helping the ICC keep unlawful interstate motor carriers off the highway. (111 Cong. Rec. 9672 (May 6, 1965) (statement of Rep. Harris,

> Chairman, Committee on Interstate and Foreign Commerce.)

Nothing here justifies the argument that Congress intended to deprive the states of their ability to otherwise regulate in the public interest, or to prevent the states from assessing regulatory fees.

The Senate was consistent in its characterization of its version of the legislation, noting that the standards defined therein were to "evidence the lawfulness of interstate operations of a carrier", by registration of ICC certificates, proof of insurance and designation of agents for service of process. S Rep No. 387, 89th Cong., Sess. 4-5 (1965) at 4-5.

It is readily apparent that the need for registration and identification requirements to be uniform was to assist the federal and state governments in addressing the problem of uncertificated, illegal interstate operators, not to eliminate fee-funded state regulatory programs.

B. The State court precedents relied upon by Petitioners do not support the conclusion that 49 USC 11506 preempts MCL 478.2(2).

Petitioners cite *State Ex Rel Sammons Trucking, Inc v Boedecker,* 158 Mont 397; 492 P2d 9919 (1972) as support for the following proposition:

> Congress has pre-empted the field of state regulation and identification of interstate motor vehicles using Montana highways. (Pet. 18).

This quotation, however, is wholly inconsistent with the well-established principle that Congress has not preempted the field of state regulation of interstate motor vehicles. *See, Roadway Express Inc v State Treasurer,* 120 Ill App 3d 133; 458 NE2d 66

(1983). In *Roadway,* the court held that Congress, in choosing to regulate transportation through the Interstate Commerce Act, did not intend to preempt the field of regulation. 458 NE2d at 68. *Sammons* involved a challenge to certain Montana identification, registration and licensing procedures for motor vehicles. It was argued that these Montana procedures imposed greater and conflicting requirements than the SSRS its regulations that limited state registration fees to $5.00 per vehicle [since increased to $10.00]. Yet, *Sammons* did not involve any discussion of a *regulatory* fee. The issue addressed there related solely to the state's *registration* fee, which Montana had failed to reduce from $10.00 to $5.00 as required by the new federal regulation. In *Sammons*, the Court held, as to the *registration* fee, that the Montana Commission was bound by the federal limitation on the amount of the registration/fee that could be charged. The ruling is not applicable to this appeal because *Sammons* in no way addressed the question of a state's power, as then expressly recognized by ICC regulations, to charge per vehicle *regulatory* fees in addition to the federally limited registration fee.

Petitioners also cite to *State Ex Rel Sammons Trucking, Inc v Bollinger,* 169 Mont 88; 544 P2d 1235 (1976). This case reviewed the Montana legislature amending its $10.00 registration fee to $5.00, so as to comply with federal law and the earlier *Sammons Trucking* case. The amendment also redefined "motor vehicle" to include any trailer, semi-trailer or dolly attached to a motor vehicle. Each "vehicular unit" became subject to the $5.00 registration fee. The Montana Supreme Court found this provision conflicted with the federal motor carrier regulations that limited the definition of motor vehicle to vehicles having a mechanical drive unit. The federal definition of motor vehicle, in conjunction with the federal $5.00 per vehicle fee maximum, clearly conflicted with the Montana legislation that

would have imposed registration fees substantially in excess of that permitted by the federal regulation.[5]

Petitioners also cite *Roadway Express, Inc v State Treasurer, supra*. *Roadway* held that the Illinois Commerce Commission possessed the power to adopt the resolution that imposed the fee exceeding the federal limit and was not preempted by Congress from doing so. 458 NE2d at 68. The court observed that the federal maximum of a $5.00 fee [now $10.00] for issuance of an identification stamp, according to the federal statute itself:

> [S]hall not preclude a state from imposing an **additional fee** in a reasonable amount to be paid to a State commission ... if such additional fee shall be subject to exclusive use by the State's commission and used by it solely for defraying the cost of the **regulation** of carriers by highway operating within the borders of such state and the enforcement of laws pertaining thereto. ... 458 NE2d at 69 [emphasis added].

The *Roadway Express* court carefully reviewed the statutes that defined the purposes for which that state's Motor Vehicle Fund could be expended. The Court then found that such purposes

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[5] Petitioners cite *Owner-Operator Independent Driver's Ass'n, Inc v Idaho Public Utilities Comm*, 125 Idaho 401; 871 P2d 818 (1994), which involved a trial court decision that part 1023 of the ICC regulations (49 CFR 1023) could be interpreted to permit a maximum annual registration fee of $20.00, instead of $10.00. The decision turned on the fact that Idaho statutes required the Idaho Public Utility Commission to charge a $25.00 Idaho registration fee on all interstate vehicles regardless of where they were license plated, which clearly exceeded the $10.00 federal maximum registration fee. The facts of that case are not at all like those presented here, which do not involve anything like the combining of separate federal maximums that characterized the Idaho case. Moreover, just like the other cases discussed above, and cited by the Petitioners, the case never considered whether Idaho was preempted from charging regulatory fees in addition to registration and/or vehicle identification fees.

included regulation of commercial relocators/repairs and maintenance of highways, and that the fund was thus not used exclusively for the regulation of highway carriers. Consequently, Illinois did not comply with the federal condition to imposition of an additional regulatory fee. 458 NE2d at 69, 70. Petitioners' reliance on *Roadway Express*, however, misses the mark. That case not only involved circumstances dissimilar to those at bar, but does not advance the holding advanced by the Petitioners, which was specifically rejected by the Court of Appeals. (Pet. App. 19, n 8).

Further, it should be noted that *Roadway Express* involved a state-imposed identification stamp fee that clearly exceeded the federal maximum. In contrast, the Michigan fees disputed by Petitioners do not involve identification fees or registration fees. Such regulatory fees are not addressed in any of Petitioners cited cases. Moreover, it cannot be too often reiterated that Michigan's regulatory fee, under MCL 478.2(2), is not, like its federally-approved $10.00 registration fee, applied to all interstate vehicles in Michigan. This regulatory fee is applied only when actual vehicular "presence" in Michigan is demonstrated, by commercially license plating the fee paying vehicle in this state. The Court of Claims recognized Petitioners' confusion of the issue by noting that Michigan has complied with the SSRS through MCL 478.7(4) and that MCL 478.2(2) is unrelated to the purpose of the SSRS. (Pet. App. 46).

Finally, in affirming the Court of Claims, the Court of Appeals stated that the issue turned on whether the interstate fee is classified as a regulatory fee or a registration fee, since a regulatory fee is plainly outside the scope of the federal law discussed (Pet. App. 16). A significant portion of the Petition fails to acknowledge the distinction between regulatory and registration fees, which distinction is well recognized in the law. The extensive safety regulation, insurance monitoring, certification process and extensive litigation, constitutes real regulation in furtherance of the non-preempted portions of the

Michigan Motor Carrier Act and Rules. Such activities are funded by the regulatory fees at issue here.

C. The issue presented does not warrant this Court's review.

The Petitioners assert that the issue in this case is important, but do so based on erroneous, speculative and exaggerated claims. For example, the Petitioners, without citation, erroneously claim that the Michigan Court of Appeals approached this case with an ill-conceived "presumption against federal preemption" which, according to the Petitioners, colored the Court's views. (Pet. 20). To the contrary, the Michigan Court of Appeals plainly followed the preemption precepts laid down by this Court. This is demonstrated by reference to Michigan Court of Appeals opinion itself. (Pet. App. 6- 7).

In its preemption analysis the Michigan Court of Appeals cites an earlier opinion in *Duprey v Huron & E R Co, Inc*, 237 Mich 662; 604 NW2d 702 (1999), which in turn references this Court's decisions in *Rice v Santa Fe Elevator Corp*, 321 US 218 (1947). *Rice* is cited for the proposition that there exists a general presumption against federal preemption. This statement is clearly in-line with the statement in *Rice*, at 230, that "we start with the assumption that the police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." In any event, the vitality of the concept of a presumption against federal preemption cannot seriously be questioned in light of this Court's decision in *New York v FERC*, 535 US 1 (2003). In that case the Federal Energy Regulatory Commission (FERC) issued an order that required utilities to unbundle (i.e., separate) transmission costs from energy costs in its retail sales. New York contended that the FERC did not have any jurisdiction to issue an order that regulated retail sales. In determining whether the FERC order was preemptive this Court addressed New York's assertion that there was a presumption against preemption. *Id.* at 18. This Court, however, indicated that since the case involved the defining of the proper scope of the federal agency's power such a presumption against preemption did not apply. *Id.* The instant

case, by contrast, does not involve the defining of a federal agency's power because neither action by nor an order of a federal agency is at issue. Thus, far from being the ill-conceived opinion the Petitioners claim it to be, the Michigan Court of Appeals opinion correctly states and follows this Court's preemption precepts. Additionally, it should be noted that in undertaking its analysis of the preemption claims the Michigan Court of Appeals had the benefit of this Court's decision in *Yellow Transportation v Michigan*, 537 US 36 (2002), that specifically addressed a preemption claim under the SSRS and which the Michigan Court of Appeals quotes in its opinion.

Having mischaracterized the Michigan Court of Appeals opinion as inconsistent with this Court's holdings regarding preemption, the Petitioners proceed to claim that the opinion creates a "loophole." This argument by Petitioners is supported only by numerous, speculative and exaggerated claims that have no support in the record. An examination of these claims establishes that they are without merit.

The Petitioners' first claim that the 'regulatory fee' approach, if adopted by other States, poses a significant threat to Congress's goal of reducing regulatory burdens imposed on interstate motor carriers. (Pet. 20). The law and the record, however, contradict this claim. First, the intent of Congress in enacting the SSRS was to eliminate the burdens associated with the multiple state registration of an interstate carrier's federal authority, and also to establish a fee system to minimize the cost of filing a proof of insurance. 49 USC 11506(c)(2)(B)(iv). Secondly, the Petitioners overlook the fact that the regulatory fee charged by MCL 478.2(2) applies only to those interstate motor vehicles that are base-plated in Michigan. The regulatory fee does not apply to all interstate motor vehicles as the Petitioners' claim appears to suggest. Thus, while Congress did, with the enactment of the SSRS, preempt a State from charging more than $10 to register and operate within the borders of that State, it did not concurrently preempt the State from charging a regulatory fee to those interstate vehicles that are base-plated in that State.

Further, the claim that the State regulatory fee charged to an interstate motor vehicle base-plated in that State will lead to a quagmire of State regulatory fees clearly overstates the degree of preemption contained in federal law. Simply put, the SSRS was not intended, and did not, relieve a motor carrier from paying any and all State fees related to the registering and plating of motor carrier vehicles. States may still charge a registration fee, limited to $10, and may still charge a regulatory fee to motor vehicles that are base-plated in that State. The States, as the record shows, have significant regulatory obligations to supervise and regulate the safety of motor carrier operations. See Affidavit of Thomas R. Lonergan, ¶ 16 (Res. App. 10b) and Affidavit of Timothy J. Yungfer, ¶¶ 2-12 (Res. App. 30b-32b).

The Petitioners then claim that the validity of a regulatory fee is based on little more than wordplay. Petitioners argue that, because the statute does not suggest any particular or special "regulatory" purpose for the charge, the fee is invalid. The finding by the Michigan Court of Appeals was that the fee prescribed by MCL 478.2(2) "could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations." Pet. App. 16. This finding was entirely consistent with the evidence placed on the record. Affidavit of Thomas R. Lonergan, ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b). The Petitioners, however, criticize the Michigan Court of Appeals arguing that it based its regulatory fee finding on a broad statement by an MPSC employee. The point here is that if the Petitioners had contested that MPSC employee statement, they had ample opportunity to present contrary evidence to the trial court to support their claim. The plain fact is that they chose not to do so. The Petitioners should not be heard now to complain about the findings of the Michigan Court of Appeals when they failed to present evidence to the trial court to support their claims. The Petitioners then state: "[t]he Opinion below invites each of the 39 SSRS states to increase its $10 fee by any amount . . . will be at the mercy of revenue seeking state legislators." (Pet. 22). Again, this is

nothing more than the Petitioners' opinion since they point to no factual basis for this claim. They also continue to ignore the distinction between vehicles base-plated in Michigan and those base-plated in other states.

Petitioners next make the assertion "the decision permits state regulatory commissions to increase state motor carrier costs without any real, practical justification." (Pet. 23). Petitioners make this assertion despite the fact that the Michigan legislature, not the Michigan Public Service Commission, determines the regulatory fees to be charged to both intrastate and interstate carriers. The Petitioners continue by questioning whether Michigan-plated vehicles have "a greater Michigan 'presence' than vehicles plated elsewhere." (Pet. 23). This is followed immediately by the sentence, "In fact, just the opposite is likely true." (Pet. 23). This sentence clearly illustrates the bind Petitioners now find themselves in because they waived the opportunity to present evidence to the trial court to support their claims. Certiorari should not be granted on unproven factual claims that Petitioners claim are "likely true." Again, Petitioners point to no evidence in the record to support their claim. Petitioners also offer the hypothetical of a small "mom and pop" carrier with a Michigan office, but "virtually no Michigan presence at all." (Pet. 24). This is an exaggerated example since this small Michigan carrier apparently provides transportation in other states and never provides transportation in Michigan. Again, this hypothetical finds no support in the record. While Petitioners assert the MCL 478.2(2) fee is "burdensome, and costly" it notes that a large Michigan based carrier with significant Michigan operations avoids paying the fee entirely by transferring its operational records out of state. (Pet. 23). Thus the Petitioners appear to be asserting either the interests of large carriers that do not pay the fee or small mom and pop carriers that do not exist. In any event, the Petition does not present an issue that warrants this court's review.

D. Under Michigan Court Rule 2.116(c)(10), summary disposition is properly granted where a party opposing such a motion failed to present evidence to support its claim.

In presenting its case at the state level, the Petitioners failed to present evidence in support of its claim that the MCL 478.2(2) is preempted by federal law. As a result, the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[6]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan courts on appeal. *Spiek v Dept of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(5).
>
> A litigant's mere pledge to establish an issue of fact at

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[6] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

> trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus, even if the Petitioners had stated a *prima facie* case when before the trial court, it was also required to show the existence of a genuine issue of material fact that is based on something more than mere conjecture. The Petitioners failed to make this showing. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534, 537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support its claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

As the Petitioners failed to present any evidence in support of its claims, the Michigan Court of Appeals correctly concluded

that the fee in MCL 478.2(7) is not a registration fee and, hence, is not subject to preemption by 49 USC 11506.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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Dated: May, 2004

APPENDIX

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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et seq, the title to which begins as follows:

> "AN ACT to promote safety upon and conserve the use of public highways of the state; …..". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to:
> ... (b) protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways;
> ...." (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the

public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> "... To provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; ...". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> "... to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; ..."

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow

> the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; ... (i) prevent unjust discrimination; ... (k) provide and maintain service to small communities and small shippers; ... (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; ..."

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and

enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (**Exhibit A**) the general jurisdiction of the Interstate

Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates, routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (**Exhibit B**) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an intrastate MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a listing is attached as **Exhibit E**. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission collected a

weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1), is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as **Exhibit C**. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another state is a fee that vehicles which are license plated in Michigan

are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See **Exhibit B** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

SINGLE STATE REGISTRATION

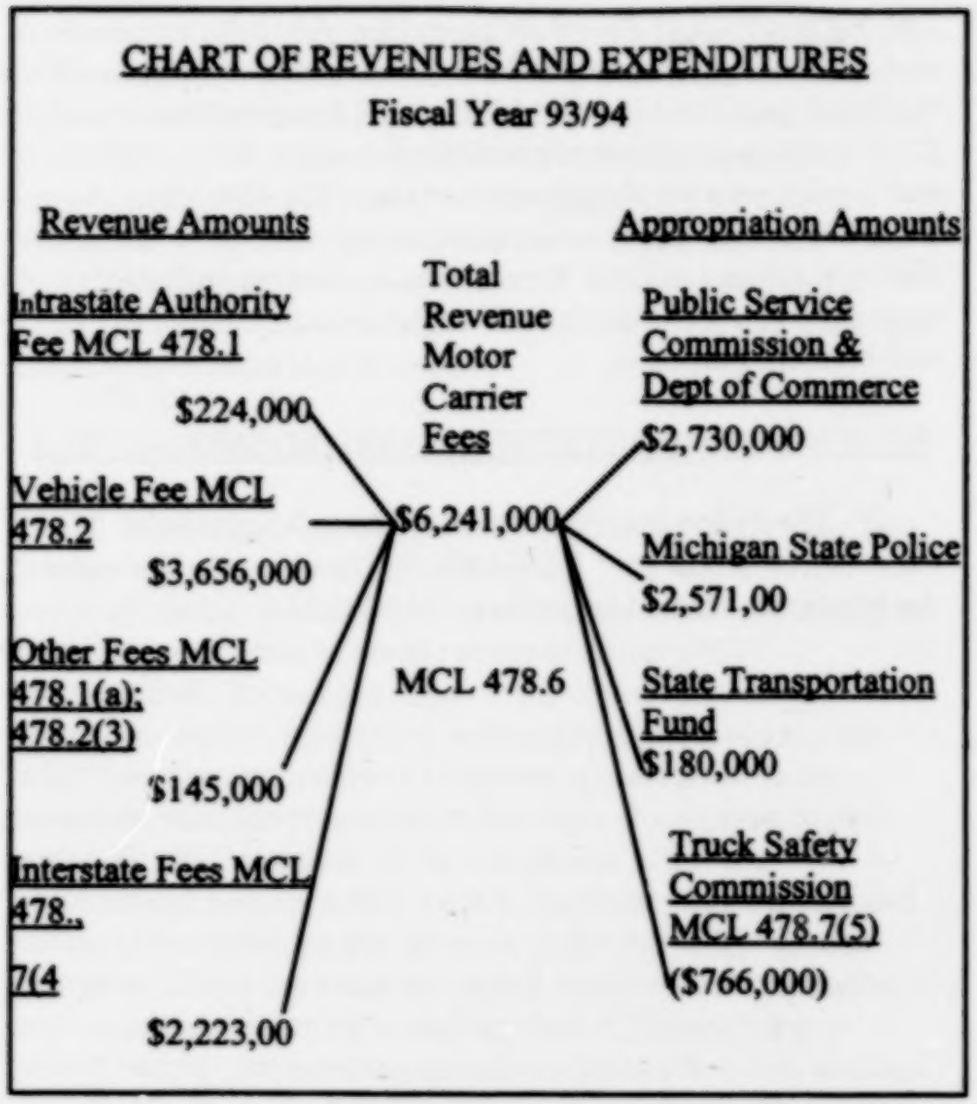
20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does not relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier

Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

(1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as **Exhibit D**. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to uniform cargo liability rules, uniform bills of lading, uniform cargo

credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . <u>related to a price, route, or service</u>" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.
>
> Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:
>
> > "[S]hall not restrict the safety regulatory authority of a State with respect to motor

> vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]

Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the

Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to economic trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of Federal Express Corp v California Public Utilities Comm, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as liability rules, antitrust immunity to publish

documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second,. . .safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective motor carrier must show that it is fit--which is defined as being safe, suitable, and financially responsible--and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by

using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's

existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws.

The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act.

Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. Safety and Compliance: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the

complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. Rates and Tariffs: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. Authorities: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. Revenue Collection and Issuance of Credentials: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but prior to preemption utilized 10 staff positions.

e. Management: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See **Exhibit B**).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority..

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me

this 14th day of September, 1995.

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
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AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including

the provisions of the Motor Carrier Act (Act No. 254 of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible

for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration,

operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

_____

Captain Timothy J. Yungfer

Subscribed and sworn to before me

this 14th day of September, 1995.

_____

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

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SUPPLEMENTAL AFFIDAVIT OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

_____
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

_____
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforcement	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

*Fiscal Year 1994/95 are projected through year end.
Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs

(3)

No. 03-1234

Supreme Court, U.S.
FILED
MAY 14 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
AND LAFOND EXPRESS, INC., on behalf
of themselves and all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN DEPARTMENT OF TREASURY,
MICHIGAN DEPARTMENT OF COMMERCE,
AND THE STATE OF MICHIGAN,

Respondents.

**On Petition For A Writ Of Certiorari
To The Michigan Court Of Appeals**

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Choosing to disregard this Court's recent clarification that no presumption against preemption applies to matters "inherently federal in character"[1] or to state regulation in areas with "a history of significant federal presence,"[2] Respondents' brief fails in its attempt to trivialize the importance of the ruling below. Neither a meaningless registration/regulatory fee distinction nor selective application of the $100 per-vehicle Interstate Decal Fee to Michigan-plated trucks lessens the fee's practical impact upon fee-paying interstate carriers. Thus, Respondents' arguments do not rescue the fee from Congress's express preemptive net or diminish the real threat the Michigan decision poses to interstate truckers across the nation. Further review is plainly warranted.

A. The Illusory "Regulatory Fee" Label Does Not Yield An Answer To The Preemption Question Posed

In an exercise in misdirection and pointless semantics, Respondents insist that only "registration" fees are preempted by the Single State Registration System ("SSRS") and that the Interstate Decal Fee is saved from

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[1] *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-348 (2001).

[2] *United States v. Locke*, 529 U.S. 89, 108 (2000). Respondents advance *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) in support of "a general presumption against federal preemption," Opp. 18, but *Rice* was expressly rejected as standing for that proposition in *Locke*, 529 U.S. at 108. Curiously, Respondents also cite *New York v. FERC*, 535 U.S. 1 (2003), which involved defining the proper scope of a federal agency's power and plainly has no bearing upon the question in this case.

preemption because it is a "regulatory" fee, not a registration fee. This now-familiar refrain, borrowed as it is from the Michigan Court of Appeals decision, evades the legal question presented. The question before this Court is whether the label attached to the Interstate Decal Fee or even the use to which its revenues are put can legally distinguish it from the per-vehicle fees Congress capped at $10 under the SSRS and the predecessor "bingo card" law. The unmistakable answer to that question is "no."

Remarkably, Respondents claim that payment of the $100 Interstate Decal Fee to the Michigan Public Service Commission ("PSC") is unlike payment of the $10 SSRS fee because it is "not a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured or that it has a named agent for service of process." Opp. 6. In fact, just the opposite is true. *Every* interstate carrier, regardless of the state in which it plates its vehicles, is prohibited from engaging in the interstate transportation of property in Michigan "without first having registered with the [PSC] and paid the required registration and vehicle fees." Mich. Comp. Laws Ann. § 478.7(1) (West 2002). The way *all* interstate carriers register with the PSC is through the SSRS, which requires *each* of them to do the same things to prove the lawfulness of their operations except that, under Michigan law, Michigan-plated carriers pay $90 per truck more for registration.

Thus, prior to the 1994 implementation of the SSRS, Michigan-plated carriers paying $100 per truck – just like carriers plated elsewhere but paying $10 per truck – were required to file proof of their federal authority, register their motor vehicles, submit evidence of insurance, and

identify their agent for service of process. Since 1994, those same Michigan-plated carriers – just like carriers that purchase their license plates elsewhere – must *still* file proof of federal authority, submit evidence of insurance, and name their agent for service of process. The only difference between the two carriers is that Michigan's SSRS form directs the Michigan-plated carrier to pay $100, instead of $10, per vehicle and to fill out another form identifying its trucks by make, model, and serial number to obtain a decal for each – even though the SSRS expressly prohibits decal requirements and the registration or identification of specific vehicles operated by the carrier. 49 U.S.C. § 14504(c)(2)(B)(iii) (2000 ed.).

In short, Respondents cannot at once acknowledge that Congress has "preempt[ed] a State from charging more than $10 to register and operate within the borders of that State,"[3] yet disregard the fact that Michigan-plated interstate carriers pay $100 per truck to register and operate within Michigan's borders while other carriers pay $10 per truck for the exact same privilege. Michigan-plated carriers "register" with Michigan for the price of $100, whether Michigan calls the assessed fee a "regulatory" fee or not. *See Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 164 n.3 (1980) (transaction privilege tax was preempted by Indian trader statutes "regardless of the label" placed upon it). *See also Jefferson County v. Acker*, 527 U.S. 423, 439 (1999) ("practical impact, not the State's name tag," determines whether tax violates Public Salary Tax Act); *City of Detroit*

[3] Opp. 19.

v. Murray Corp., 355 U.S. 489, 492 (1958) (in determining constitutionality of a tax, "we must look through form and behind labels to substance").

Nor can the so-called "regulatory" use to which its revenues are put distinguish the Interstate Decal Fee from the $10 SSRS fee Michigan otherwise collects. Respondents emphasize witness testimony that the Interstate Decal Fee supports a whole host of laws governing commercial motor vehicles and carriers after it is "placed to the credit of the [PSC]" and "appropriated . . . in such proportions as the legislature may determine." Mich. Comp. Laws Ann. § 478.6 (West 2002). However, Respondents conveniently ignore that the $10 SSRS fee (along with every other fee collected by the PSC) is *also* "placed to the credit of the [PSC]" and, as Respondents' own witness explains, combined with all other motor carrier fee revenue for appropriation to the *same* "regulatory" agencies for the *same* "regulatory" use Respondents so insistently assign to the Intestate Decal Fee alone.[4] The $10 SSRS fee is just as "regulatory" in nature as the $100 Interstate Decal Fee, and the Interstate Decal Fee serves no more "regulatory" purpose than any other fee collected by the PSC from any motor carrier in Michigan.

Therefore, whatever differences there may be between the $10 SSRS fee and the $100 Interstate Decal Fee, "they are distinctions without a legal difference." *Xerox Corp. v. County of Harris*, 459 U.S. 145, 154 (1982). The only real

[4] Opp. App. 8b-14b. In addition, under Mich. Comp. Laws Ann. § 478.7(5), a portion of the SSRS fee is designated for deposit in the Michigan Truck Safety Fund for use in "regulatory" endeavors. Opp. App. 13b.

difference between the two fees is $90, and it is that distinction that makes the Interstate Decal Fee incompatible with Congress's proclamation that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C) (2000 ed.).

B. The Interstate Decal Fee's Practical Impact, Not Its Name Or Its Purpose, Determines the Outcome Of This Controversy

It makes no difference that Congress did not make specific reference to "regulatory fees" in adopting the SSRS or its predecessor "bingo card" program. State law yields under Supremacy Clause analysis if it "stands as an obstacle" to full implementation of the federal law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or otherwise frustrates the accomplishment of a federal objective. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). Thus, by way of example only, *Perez v. Campbell*, 402 U.S. 637 (1971) did not require an express reference to state highway safety laws before construing the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors. Nor did federal law make express reference to state registration standards for aliens when the Federal Alien Registration Act was deemed preemptive of state registration laws in *Hines*, *supra*. Whether or not Congress has made an express preemptive pronouncement on a particular topic, state regulation must yield to the extent it actually conflicts with federal law. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648-649 (1990).

Furthermore, it matters not whether the Michigan legislature intended by its adoption of the Interstate Decal Fee to serve some purpose other than to frustrate the goals of the SSRS. Over three decades ago, this Court declared that it could no longer "adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing the law had some purpose in mind other than one of frustration." *Perez*, 402 U.S. at 651-52. Differently stated, "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992). Accordingly, the "key question" is "at what point the state regulation sufficiently interferes with federal regulation that it should be deemed pre-empted." *Id.*

That the Interstate Decal Fee blatantly interferes with and frustrates Congress's purpose in limiting per-vehicle fees imposed on interstate carriers cannot be seriously debated. Every Michigan-plated motor carrier seeking to engage in interstate trade on Michigan's highways must pay the PSC $100 per truck for the privilege of conducting its business. The fee, therefore, stands as a $100 obstacle for each truck the interstate motor carrier hopes to operate in and out of the state even though Congress declared that no more than $10 should be paid to clear the roadway for each such truck. Under such circumstances, the Interstate Decal Fee unquestionably frustrates the purpose of Congress when, through implementation of the original "bingo card" program, it sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" and to establish *uniform* registration requirements imposed by state regulatory

commissions. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. Similarly, the Interstate Decal Fee interferes with Congress's goal in enacting the SSRS, which was to establish "a fee system . . . that [would] minimize the costs of complying with the registration system," 49 U.S.C. § 11506(c)(2)(B)(iv)(II) (1994 ed.), and "benefit the interstate carriers by eliminating unnecessary compliance burdens" so that consumers would also profit from cost savings. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817.

No evidence was required for the lower courts to reach such conclusions. Nor was evidence required to rebut Respondents' new-found contention that the Interstate Decal Fee is somehow justified by "actual vehicular 'presence' in Michigan" allegedly evidenced by "commercially license plating the fee paying vehicle in [Michigan]." Opp. 17. Setting aside for the moment that the Michigan Court of Appeals made no mention of *any* "vehicular presence" justification for the Interstate Decal Fee, Petitioners previously demonstrated that Michigan may be the base-plating state pursuant to the International Registration Plan ("IRP") under circumstances that have little to do with a "regulatory presence" within the state's borders.[5]

In any event, whatever Michigan's professed purpose for the Interstate Decal Fee might be, that purpose is no

[5] Pet. 23-24. Despite its heavy dose of sarcasm (Opp. 21), Respondents' brief does not dispute the inherent truth of our point that small Michigan-based carriers imposing little regulatory burden upon the State cannot avoid the fee because they have no out-of-state terminals while large carriers with a significant Michigan presence and a terminal out of state can escape fee payment altogether.

more determinative than the fee's name. Preemption analysis turns not on whether federal and state laws "are aimed at distinct and different evils," but whether they "operate upon the same object." *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 612 (1926). In this case, the object upon which federal and state law both operate is the same interstate truck, and the Interstate Decal Fee's application to *any* interstate truck – paid as it is for the mere privilege of traveling upon the state's highways – does not square with the $10 per-vehicle fee cap imposed by federal law. The Interstate Decal Fee must therefore yield to Congress's express preemptive strike.

C. The Importance Of The Issue Presented Here Should Not Be Trivialized

Notwithstanding their characterization of our position as "erroneous, speculative and exaggerated," Opp. 18, Respondents' argument *acknowledges* that the issue presented here is a potentially recurring one of great practical importance. Both the Michigan Court of Appeals and Respondents maintain that, because the SSRS does not prohibit flat per-vehicle "regulatory" fees, Michigan may charge Petitioners $100 per vehicle every year for whatever "regulatory" purpose it desires. That rationale, if true, proves our point that the Michigan court ruling opens the floodgates for other States to assess any and all per-vehicle "regulatory" fees they see fit to impose in any amount for any "regulatory" reason. The adverse impact upon interstate trucking interests, in that event, could be monumental.

Seventeen years ago in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), this Court recognized that

plating fees imposed under the IRP and fuel taxes assessed under the International Fuel Tax Agreement, both of which are apportioned based upon a motor vehicle's mileage within a state, readily satisfy dormant Commerce Clause jurisprudence. *Id.* at 282-283. In contrast, however, flat unapportioned per-vehicle fees imposed on interstate carriers

> penalize some travel within the free trade area. . . . [T]heir inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State. . . . If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284. *Scheiner* thus teaches that States requiring "regulatory" revenue must collect it on an apportioned basis that measures the fee-payer's use of State facilities because a flat unapportioned per-vehicle fee "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287.

The words of *Scheiner* echo back at interstate truckers when they hear Respondents' hollow claim that any State is free to impose a flat per-vehicle "regulatory fee" in any amount it chooses. Congress, as the federal authority with preeminent power over matters involving interstate commerce and interstate trucking in particular, saw fit to authorize flat per-vehicle fees of no more than $10 and declared anything higher than that charge to be a burden upon interstate commerce. Nevertheless, Respondents' position and the lower court ruling both demonstrate that the SSRS may be read by state regulatory commissions as

Congressional *authority* for flat, per-vehicle "regulatory fees" in any amount, and, if so, interstate carriers will be required to revisit and fight again the same flat fee battles they fought so hard to win in *Scheiner*. The Michigan court's ruling, therefore, should not be permitted to stand.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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No. 03-1230, 03-1234, and 03-1250

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
and USF HOLLAND, INC., *Petitioners,*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC, ET AL, *Petitioners*
v.
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

On Petitions For Writs of Certiorari
To The Michigan Court of Appeals

RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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On June 7, 2004, this Court invited the U.S. Solicitor General to file a brief expressing the views of the United States. On December 17, 2004, the United States filed its brief as amicus curiae. This supplemental brief responds to the Brief of the United States.

INTRODUCTION

The most significant aspect in these cases is the almost total absence of facts to support the Petitioners' claims. Despite having numerous opportunities to present facts to the trial court the Petitioners failed to do so. Thus, following the filing of motions for summary dispositions, the Petitioners' lawsuits were dismissed in accordance with the Michigan Court Rules. The Michigan Court of Appeals below made repeated references to the Petitioners' failure to develop a factual record.

Despite Petitioners' failure to develop a factual record, the United States, as amicus curiae, argues that certiorari should be granted in two cases (Case Nos. 03-1230 and 03-1234) and at one point even suggests that this Court decide the law and consider remanding the matter back to the Michigan courts for the development of a factual record. This clearly is placing the cart before the horse. Moreover, it effectively nullifies the requirement under the Michigan Court Rules, that a litigant, when challenged, has the obligation to set forth facts that supports its claims. Because of the lack of an adequate factual record and because of a lack of a meaningful conflict between the Michigan Court of Appeals' decision and a decision of another state court or a United States Court of Appeals, certiorari should be denied in all three cases.

A. Case No. 03-1230

The brief for the United States, despite its recommendation to the contrary, confirms that the petition in 03-1230 does not warrant this Court's review. In footnote 11, appearing on page 17 of its brief, the United States candidly admits that the record fails to show "the extent" to which the Michigan fee "actually deters

out-of-state carriers from competing with intrastate hauls" or "the extent" to which the fee "otherwise affects out-of-state carriers disproportionately or burdens interstate commerce." The footnote then concludes, saying:

> Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan Courts for application of that framework, including the development of any further factual record that may be necessary.

In short, the United States is asking this Court to issue an advisory opinion on the controlling law in the absence of facts supporting the Petitioners' claims.

There are problems with this approach, however. First, while the Court may attempt to anticipate and decide all aspects presented with this claim, subsequent remand proceedings may very well demonstrate that a critical question was not addressed, perhaps necessitating further review by this Court. In short, because the facts have not been fully developed, No. 03-1230 is not suitable for review. Second, such an approach effectively nullifies Michigan Court Rule (MCR) 2.116(C)(10), that provides that summary disposition is properly granted against a party when that party fails to present evidence to support its claims. As the Respondents noted in their Brief in Opposition the Michigan Court of Appeals determined that the Petitioners' claim was a "matter of pure speculation" and affirmed the trial court's grant of summary disposition against Petitioners. Were this Court to grant certiorari in the manner suggested by the United States, Petitioners would effectively be permitted to evade MCR 2.116(C)(10), without the wisdom or basis of that court rule ever being addressed.

Finally, the claim by the United States that the Michigan Court of Appeals' decision brings it into conflict with the highest courts of three States is misplaced. As the Respondents noted and explained in their Brief in Opposition the charges that were assessed in those cases bear little similarity to and were of an entirely different character than the fee challenged here. Moreover, it is clear that in each of those cases the challenges involved a more fully developed factual record than presented here. Indeed in *American Trucking Ass'n v New Jersey*, 852 A2d 142, 146 (2004), the New Jersey Supreme Court specifically noted that in 2000 it had issued an order [752 A2d 1286 (2000)] remanding the case back to the trial court due to the "need for a well-developed factual record before deciding the ultimate constitutional issues." The need for a well-developed factual record to support Petitioners' claims in this case is no less than in the case before the New Jersey Supreme Court. Here, however, the Petitioners waived that opportunity by failing to present facts to the trial court when it was required to do so under the Michigan Court Rules. Eleventh-hour attempts to resuscitate Petitioners' claim without the evidence to support it do not warrant the granting of certiorari.

B. Case No. 03-1234

The Petitioners in No. 03-1234 likewise failed to present evidence to support their claims when required to do so by the Michigan Court Rules. Instead their challenge is based on erroneous, speculative, and exaggerated claims as fully detailed in the Respondents' Brief in Opposition. The United States' brief fares no better in that it overlooks the fact that the fee charged by Michigan Compiled Laws (MCL) 478.2(2) is a regulatory fee that applies only to those interstate motor vehicles that are base-plated in Michigan. The failure to recognize this critical distinction reflects a fundamental misunderstanding of the Michigan law.

When discussing whether the Single State Registration System (SSRS) preempts the $100 fee imposed by Michigan under MCL 478.2(2), the United States says, "The question here

is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS." Brief for the United States, p 9. (Emphasis in original). Yet, when quoting from the SSRS, 49 USC § 14504(c)(2)(C), the United States omits important controlling language. This statute states, "The charging or collection of any fee under this section that is not in accordance with the fee system *established under subparagraph (B)(iv) of this paragraph* shall be deemed to be a burden on interstate commerce." (Language omitted by the United States is in italics).

Subparagraph (B)(iv) of 49 USC § 14504 states:

> (iv) [The standards of the Secretary] shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –
>
> > (I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;
> >
> > (II) minimizes the costs of complying with the registration system; and
> >
> > (III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

It is clear from this unambiguous language that the reliance by the United States on 49 USC § 14504 is misplaced. The reference to "the charging or collection of any fee under this section that is not in accordance with the fee system * * * shall be deemed to be a burden on interstate commerce" relates to fees for filing interstate motor carrier's proof of insurance, not a regulatory fee that includes safety reviews, investigations and roadside enforcement by Michigan State Police. See Affidavit of Thomas R. Lonergan, ¶¶ 16, 23-25, (Respondents' Brief in Opposition, Case No. 03-1234, Res. App. pp 10b, 14b-16b);

Affidavit of Captain Timothy J. Yungfer, ¶¶ 2-12 (Respondents' Brief in Opposition, Case No. 03-1234, Resp. App. pp 30b-32b).

SSRS compliance can be found under MCL 478.7, mandating a $10.00 maximum fee for the filing of an interstate motor carrier proof of insurance and Interstate Commerce Commission (ICC) permit. To help defray the costs of safety regulation and enforcement on Michigan highways, MCL 478.2(2) imposes a $100 fee on vehicles that are issued Michigan license plates. Michigan does not collect the $100 fee from interstate motor carriers that are not base-plated in Michigan.

In support of its argument, the United States cites *State Ex Rel Sammons Trucking, Inc v Boedecker*, 158 Mont 397; 492 P2d 919 (1972). In that case, the Montana Public Commission registered all interstate carriers under the state statute. The Court held that the federal bingo card system, including regulations promulgated by the ICC, was controlling over contrary state law provisions. In this case, there is no conflict between federal and state law. Unlike MCL 478.2(2), the Montana fee specifically related to the issuance of the state certificate to all motor carriers. The regulatory fee under MCL 478.2(2) is not a fee charged to allow vehicles to cross into the state territory but rather the fees are only imposed on Michigan-plated carriers to cover the cost of safety regulations.

C. Case No. 03-1250

The Respondents agree with the United States that the Petition in No. 03-1250 does not warrant certiorari.

CONCLUSION

The failure of the Petitioners in 03-1230 and 03-1234 to present facts to support their claims when required to do so under the Michigan Court Rules justified the dismissal of those claims by the trial court. As such, they are not suitable for review by this Court.

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Dated: January, 2005

(5)

No. 03-1234

In The
Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
AND LAFOND EXPRESS, INC., on behalf
of themselves and all others similarly situated,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION,
MICHIGAN DEPARTMENT OF TREASURY,
MICHIGAN DEPARTMENT OF COMMERCE,
AND THE STATE OF MICHIGAN,

Respondents.

On Petition For A Writ Of Certiorari
To The Michigan Court Of Appeals

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, Petitioners submit this supplemental brief in response to the Brief for the United States as *amicus curiae*. Although the United States fully supports a grant of certiorari to review the $100 Interstate Decal Fee under the Single State Registration System ("SSRS"), it suggests that the Court "might wish to reformulate the question presented" by declining to address the federal "bingo card" program replaced by the SSRS's implementation. (*U.S. Brief* at 11). At the same time, however, the United States acknowledges that the bingo card program was no less preemptive in scope and rendered the Interstate Decal Fee unlawful long before the SSRS changed the procedures by which States register interstate carrier operations:

> [T]he interstate fee was preempted by the bingo card system because it was precisely the type of fee regulated by that system, and it exceeded the lawful amount.

(*U.S. Brief* at 11 n.6).

Respectfully, Petitioners submit that a grant of certiorari should test the $100 Interstate Decal Fee under both the SSRS and the predecessor bingo card program. The Michigan Court of Appeals' faulty preemption analysis permeates its entire decision and indiscriminately disregards the command of Congress in both pre- and post-SSRS laws.[1] As such, the court's fundamental misreading

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[1] *Compare* 49 U.S.C. § 11506(b) (1988 ed.) (repealed) ("[w]hen a State registration requirement imposes obligations in excess of the [Interstate Commerce Commission's bingo card] standards, the part in excess is an unreasonable burden [on interstate transportation]") *with* 49 U.S.C. § 14504(b) (2000 ed.) ("[w]hen a State registration requirement imposes

(Continued on following page)

of the canons of federal preemption is sufficiently important to warrant review. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (correcting lower court's erroneous application of the federal preemption doctrine).

In addition, the Michigan court's mistaken preemption analysis left unaddressed the refund claims of hundreds of class members under Mich. Comp. Laws Ann. § 600.6452(1) (West 2002), which applies a three-year statute of limitations to the January 3, 1995 filing of Petitioners' complaint. Accordingly, the validity of the Interstate Decal Fee under the bingo card program before implementation of the SSRS is fiscally important to both the certified class of feepayers in this case and the State of Michigan. Support for the grant of certiorari under such circumstances can be found in *Territory of Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959), in which certiorari was granted to assess the impact of a repealed tax statute "in view of the fiscal importance of the question to Alaska." *See also Bigelow v. Virginia*, 421 U.S. 809, 813-814 (1975) (certiorari granted despite intervening amendment changing application and scope of statute under review); *Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (lower court decision affecting status and claims of thousands of draftees called for Court's review).

---

obligations in excess of the [SSRS] standards of the Secretary, the part in excess is an unreasonable burden [on interstate transportation]"). Indeed, the nearly identical wording of the two statutory schemes would warrant a summary reversal on the lawfulness of the Interstate Decal Fee under the bingo card program upon a finding that the fee violates the SSRS.

Finally, because this Court has the plenary power "to do justice as the case requires," *Tender v. U.S.*, 345 U.S. 565, 570 (1953), Petitioners ask the Court to add *all* of this case to the list of others in which it has rectified plain and obvious misapplications of important federal principles affecting the rights of citizens and States alike. *E.g., Florida v. Rodriguez*, 469 U.S. 1, 5 (1984) (per curiam) (lower court order reflected a "misapprehension" of controlling Fourth Amendment principles); *Florida v. Meyers*, 466 U.S. 380, 382 (1984) (court below "either misunderstood or ignored" prior Fourth Amendment rulings); *Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983) (per curiam) (lower court "inexplicably" failed to apply dispositive Due Process Clause case law); *Florida Dep't of Health & Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 147 (1981) (per curiam) (court below "misapplied" the prevailing Eleventh Amendment standard). *Cf.* Supreme Court Justice William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984) ("the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court"). Michigan's $100 Interstate Decal Fee was just as forbidden by the bingo card program as it is by the SSRS, and the Michigan court's preemption analysis is just as misguided on the one subject as it is on the other. Complete review of the question presented, therefore, is warranted.

The Petition for Writ of Certiorari should be granted in its entirety.

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Nos. 03-1230, 03-1234, and 03-1250

Supreme Court, U.S.
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In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., AND USF HOLLAND, INC., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

MID-CON FREIGHT SYSTEMS, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

TROY CAB, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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QUESTIONS PRESENTED

The State of Michigan imposes upon motor carriers licensed in that State a $100 annual fee for each vehicle registered in the State and "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002). Michigan also imposes upon motor carriers a $100 annual fee for each vehicle that operates at least in part in intrastate transportation. *Id.* § 478.2(1). The questions presented are:

(1) Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.

(2) Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

(3) Whether the $100 fee upon vehicles conducting intrastate operations is preempted by 49 U.S.C. 14501.

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This brief is submitted in response to the orders of this Court inviting the Acting Solicitor General to express the views of the United States. Because all three petitions challenge the same decision of the Michigan Court of Appeals, this consolidated brief responds to all of the Court's orders.

STATEMENT

1. a. In 1965, Congress authorized States to impose registration requirements on interstate motor carriers operating within their borders. 49 U.S.C. 302(b)(2) (1970). Congress determined that such requirements would not constitute undue burdens on interstate commerce insofar as they were consistent with regulations promulgated by the Interstate Commerce Commission (ICC). *Ibid.*; *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 (2002).

Until 1994, the ICC permitted each State to charge an interstate motor carrier operating within its borders an annual registration fee of up to $10 per vehicle. 49 C.F.R. 1023.33 (1992). This became known as the "bingo card" system because each State issued a stamp for each vehicle, and the motor carrier affixed the stamp to a card carried in the vehicle, as proof of registration. 49 C.F.R. 1023.32 (1992); *Yellow Transp.*, 537 U.S. at 39.

In order to reduce administrative burdens on motor carriers, Congress directed the ICC in 1991 to implement a new system, called the Single State Registration System (SSRS), under which each motor carrier "register[s] annually with only one State." 49 U.S.C. 14504(c)(1)(A).[1] Under the SSRS, each State may still charge a fee, "equal to the

[1] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the SSRS. 49 U.S.C. 14504(c)(2)(D). The 11 ineligible States are listed in H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. 1, at 49 (1991). Oregon is eligible to participate but does not do so. Thus, 38 States participate in the single-state program.

fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III). Those fees are collected and distributed to other States by the single State in which the vehicle is registered. 49 C.F.R. 367.6(a).

Congress determined that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce." 49 U.S.C. 14504(c)(2)(C). When Congress abolished the ICC in 1995, it assigned authority to administer the SSRS to the Secretary of Transportation. *Yellow Transp.*, 537 U.S. at 39-40 n.* (citing Pub. L. No. 104-88, 109 Stat. 803).

b. Section 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1605, forbids a State from "enact[ing] or enforc[ing] a law, regulation, or other provision * * * related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision out of concern that "'the regulation of intrastate transportation of property by the States' unreasonably burdened free trade, interstate commerce, and American consumers." *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002) (quoting § 601(a)(1), 108 Stat. 1605). Congress specified that Section 601 does not restrict "the safety regulatory authority of a State with respect to motor vehicles," the "authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements," or other regulatory authority regarding the transportation of household goods or non-consensual tow truck services. 49 U.S.C. 14501(c)(2).

2. Michigan imposes three relevant fees on motor carriers. First, under the SSRS, Michigan charges interstate carriers operating in Michigan a maximum annual fee of $10

for each truck licensed in *another* State. Mich. Comp. Laws Ann. § 478.7(4) (West 2002).[2] That fee is not at issue here. Second, "[a] motor carrier licensed in [Michigan] shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier *which is registered in [Michigan]* and operating entirely in interstate commerce." *Id.* § 478.2(2) (the "interstate fee") (emphasis added). Third, Michigan also charges an annual fee of $100 "for each self-propelled motor vehicle operated by or on behalf of [a] motor carrier." Mich. § 478.2(1) (the "intrastate fee"). In practice, Michigan assesses that fee only on trucks that engage in whole or in part in intrastate operations in Michigan. 03-1234 Br. in Opp. App. 8b.

3. In 1995, petitioner Westlake Transportation brought a class action against respondents, alleging that the $100 intrastate and interstate fees are preempted by 49 U.S.C. 14501 and 14504. Shortly thereafter, petitioner Troy Cab and other petitioners filed a class action making similar allegations, and petitioners American Trucking Associations and USF Holland filed suit alleging that the intrastate fee violates the Commerce Clause of the United States Constitution, Art. I, § 8, Cl. 3. After all of the petitioners amended their complaints to adopt each others' claims, the Michigan Court of Claims consolidated the cases, certified the classes, and granted summary disposition to respondents. 03-1234 Pet. App. 36- 72.

The Court of Claims determined that the $100 interstate fee is not preempted by federal law because the SSRS "places a $10.00 annual vehicle fee limit on only the 'participating states,' * * * not on the 'registering state,'" and Michigan's $100 interstate fee applies only to vehicles registered in Michigan. 03-1234 Pet. App. 46; accord *id.* at

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[2] As explained above, under the SSRS, that fee is actually collected by the State in which the carrier is registered and then paid over to Michigan. See pp. 1-2, *supra*.

68-69. The court also upheld the intrastate fee against petitioners' Commerce Clause challenge because the fee applies only to carriers that choose to engage in point-to-point transportation of property within Michigan, and the fee was intended to ensure that vehicles and carriers that provide intrastate service on Michigan highways comply with Michigan's safety and fitness norms. *Id.* at 48-49. Finally, the court held that Section 601 of the FAAAA does not preempt the intrastate fee, noting that Michigan has not used the fees to engage in preempted economic regulation. *Id.* at 44-45.

4. The Michigan Court of Appeals affirmed. 03-1234 Pet. App. 1-35. The Court of Appeals disagreed with the Court of Claims' conclusion that the SSRS imposes no limit on fees charged by the States in which the carrier is registered. "A registration state is simply a participating state in which a motor carrier is registering," the court explained, and the federal statute draws no distinction between the two. *Id.* at 15. Nonetheless, the court held that the interstate fee is not preempted under the SSRS (or the predecessor bingo card system) because it "could reasonably be classified as a regulatory fee," as opposed to a "registration fee." *Id.* at 16; accord *id.* at 19. The court concluded that "[i]f the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee" exempt from federal preemption. *Id.* at 16-17.

Turning to the intrastate fee, the Court of Appeals concluded that the fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." 03-1234 Pet. App. 32. The court nonetheless upheld the fee on the theory that it "regulates even-handedly." *Id.* at 34. The court acknowledged petitioners' contention that the fee discriminates against interstate commerce because carriers that travel both intrastate and interstate "invariably will pay a higher per-mile fee than the carrier who operates solely

intrastate," but the court deemed that point insignificant because petitioners "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee." *Id.* at 33-34. The court distinguished this Court's decision in *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266 (1987)—which held two unapportioned flat taxes on interstate trucking carriers to be unconstitutional—on the theory that *Scheiner* applies only to taxes for the privilege of doing business in the State, not to "regulatory statutes." 03-1234 Pet. App. 32 n.15.

The Court of Appeals also held that the intrastate fee is not preempted by Section 601 of the FAAAA because there is no evidence that Michigan uses the fees to fund the enforcement of preempted regulations of rates, routes, or services. 03-1234 Pet. App. 21. The court rejected petitioners' argument that the Court of Claims erred by limiting discovery and briefing on that issue. *Id.* at 22-23.

5. The Michigan Supreme Court denied petitioners' application for leave to appeal. 03-1234 Pet. App. 73-75.

DISCUSSION

The $100 fee imposed by Section 478.2(2) of the Michigan statute on carriers that operate solely in interstate commerce is precisely the type of burden on interstate commerce that is prohibited by the Single State Registration System established under 49 U.S.C. 14504. The Michigan Court of Appeals' contrary holding opens a significant loophole in the SSRS, and undermines Congress's efforts to reduce financial and administrative barriers to interstate commerce. Although the separate $100 fee imposed by Section 478.2(1) of the Michigan statute on carriers that engage in at least some point-to-point intrastate transportation in Michigan does not directly implicate the federal statutory scheme, the Court of Appeals' rationale for upholding Section 478.2(1) against dormant Commerce Clause scrutiny is incorrect and difficult to square with decisions of this

Court and the highest courts of other States. If that erroneous rationale is rejected by this Court, however, the validity of the $100 flat fee on interstate carriers that engage in intrastate commerce within Michigan nonetheless presents a difficult and unresolved question that calls for reconciliation of two different strands of this Court's Commerce Clause jurisprudence. Accordingly, the petitions for writs of certiorari in Nos. 03-1234 (Mid-Con) and 03-1230 (American Trucking Associations) should be granted. The petition in No. 03-1250 (Troy Cab) should not be granted because it does not present a substantial question warranting review by this Court.

A. The Court Should Review The Validity Of Michigan's $100 Interstate Fee

By holding that Michigan's $100 fee on carriers that engage only in interstate commerce is not preempted by the SSRS, the Court of Appeals erred on an important question of federal law.

1. Congress enacted the SSRS against the backdrop of this Court's dormant Commerce Clause jurisprudence, which generally prohibits States from discriminating against interstate commerce or otherwise imposing undue burdens on such commerce. See, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). Congress determined that requirements that motor carriers engaging in interstate commerce must register with a State, or pay fees for that privilege, would impose undue burdens on interstate commerce *unless* they were undertaken pursuant to the SSRS. 49 U.S.C. 14504(b) ("When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden."); 49 U.S.C. 14504(c)(2)(C) ("The charging or collection of any fee under this section that is not in accordance with th[is] fee system * * * shall be deemed to be a burden on interstate commerce.").

Under the SSRS, a motor carrier is required to register with only one State, and only that State may collect fees on behalf of itself and other participating States. 49 U.S.C. 14504(c)(1)(A) and (2)(A)(iii). The fees are allocated among the participating States in which the carrier operates, 49 C.F.R. 367.6(a), and the amount of the fee collected on behalf of any participating State is "*not to exceed $10 per vehicle.*" 49 U.S.C. 14504(c)(2)(B)(iv)(III) (emphasis added).

The $100 fee imposed by Michigan on carriers engaged solely in interstate commerce in Michigan does not satisfy those requirements. Although Michigan complies with the SSRS with respect to vehicles licensed in *other* States, see Mich. Comp. Laws Ann. § 478.7(4), the $100 fee for vehicles licensed in Michigan is ten times the $10 permitted under the SSRS. As the Court of Appeals correctly recognized, the SSRS draws no distinction between fees charged by the State of registration and fees charged by other States. 03-1234 Pet. App. 15. The $10 cap applies to *every* "participating State," 49 U.S.C. 14504(c)(2)(B)(iv)(III), including the one in which a carrier registers. See 03-1234 Pet. App. 15 ("A registration state is simply a participating state in which a motor carrier is registering."); 49 C.F.R. 367.3(a) ("Each motor carrier required to register and pay filing fees must select a single participating State as its registration State."). Because the $100 interstate fee is prohibited by the SSRS, it is preempted.

The Court of Appeals attempted to elide that conclusion by asserting that the SSRS preempts only "registration" fees, as opposed to "regulatory" fees, and that "the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of [state law]." 03-1234 Pet. App. 16. The court based that conclusion on a state court decision distinguishing between "user fee[s]" and "tax[es]" for purposes of a state-law restriction on the imposition of new taxes by units of local gov-

ernment. *Ibid.* (citing *Bolt* v. *Lansing*, 587 N.W.2d 264, 268 (Mich. 1998)). That state-law distinction is irrelevant to the *federal* question here, and nothing in Section 14504 limits the statute's reach to "registration" fees or fees given any other specific label. Nor does anything in the statute exclude fees dubbed "regulatory." Instead, it prohibits "[t]he charging or collection of *any* fee under this section that is not in accordance with" the SSRS. 49 U.S.C. 14504(c)(2)(C) (emphasis added).

In light of that broad and inclusive statutory language, there is no question the interstate fee is covered by Section 14504. The fee is charged to motor carriers licensed in Michigan for every vehicle "registered in this state and operating entirely in interstate commerce." Mich. § 478.2(2). Because the fee is imposed *solely for registering* to participate in interstate commerce, it is hard to characterize it as anything other than a "registration fee," and in any event it is precisely the type of fee Congress sought to regulate. Indeed, Michigan "waives" the lawful $10 interstate "registration fee" for every truck for which the carrier pays the unlawful $100 fee. 03-1234 Pet. App. 16 n.6. As this practice reflects, the only difference between the SSRS fee and the Michigan interstate fee is the amount.

Moreover, when an interstate carrier pays the $100 fee under Section 478.2(2), respondents assign the carrier a decal that it must display as proof of payment. 03-1234 Br. in Opp. App. 10b. That requirement independently violates the SSRS's prohibition against "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by a motor carrier," 49 C.F.R. 367.5(g); see 49 U.S.C. 14504(c)(2)(B)(iii)—and thereby provides further confirmation that Michigan's interstate fee is the type of fee the SSRS prohibits.

The Court of Appeals erred by relying on repealed ICC regulations, which predated the SSRS, for the proposition

that a State may collect taxes and fees to defray regulatory and law-enforcement costs. 03-1234 Pet. App. 17-18 (citing 49 C.F.R. 1023.104 (1991); 49 C.F.R. 1023.105 (1991)). The question here is not whether a State may impose *any* taxes or fees on motor carriers; instead, the question is whether it may impose fees covered by the SSRS in excess of the amounts permitted by the SSRS. If a State could do so, the SSRS fee caps would be a dead letter.[3]

2. The validity of Michigan's interstate fee warrants this Court's review. Barriers to interstate commerce harm the national economy, contrary to the Framers' intent to create a nationwide "area of trade free from interference by the States." *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 280 (1987) (quoting *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 328 (1977)). Congress has twice recognized the importance of minimizing barriers to interstate trucking, first when it enacted the bingo card system, and later when it replaced that system with the SSRS. 49 U.S.C. 302(b)(2) (1970); 49 U.S.C. 14504(b) and (c)(2)(C); see *Yellow Transp.*, 537 U.S. at 39-40. The decision below strikes at the heart of Congress's design by sanctioning increased monetary and administrative barriers to the conduct of interstate commerce. This Court has granted certiorari in numerous other cases raising similar interstate commerce concerns, even in the absence of an asserted conflict among appellate courts. See, *e.g.*, *Hillside Dairy, Inc.* v. *Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors* v. *Tracy*, 519 U.S.

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[3] States remain free to collect other taxes and exactions, such as fuel taxes and tolls, that are related to the extent of a carrier's use of their roads. In contrast to the flat fee at issue here, imposed solely for registration to engage in interstate commerce, those taxes do not fall within the scope of Section 14504. Nor do such charges burden interstate commerce to the extent that flat fees do. See pp. 12-13, 16-17, *infra*.

278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991); *Scheiner*, *supra*.

In this case, moreover, there is a division in authority because other courts have correctly rejected efforts to circumvent the fee cap. 03-1234 Pet. 18. Especially apposite is *State ex rel. Sammons Trucking Inc.* v. *Boedecker*, 492 P.2d 919, 919-920 (Mont. 1972), where the Supreme Court of Montana held that a $10 "license fee" was preempted by the bingo card system, which imposed a $5 cap at the time. Respondents contend (03-1234 Br. in Opp. 15) that *Boedecker* is distinguishable because it involved a "*registration* fee" as opposed to a "*regulatory* fee." As explained above (see pp. 7-8, *supra*), 49 U.S.C. 14504 does not draw such a distinction.[4] In any event, the fee imposed by Michigan is as much a registration fee as the one in *Boedecker*. The fee is imposed on carriers that are licensed in Michigan for each vehicle that is "*registered* in the state and operating entirely in interstate commerce." Mich. § 478.2(2) (emphasis added); see p. 8, *supra*.

Thus, the validity of the "regulatory fee"/"registration fee" distinction is part and parcel of the issue on which courts have divided.[5] If the distinction between regulatory and registration fees has no role to play in a proper interpretation of the statute, then it equally provides no basis to distinguish *Boedecker*. Moreover, that illusory distinction serves only to underscore the mischief the decision below could cause. If other States attempted to exempt themselves from the SSRS by invoking the "regulatory fee" label, "commerce among the States would be deterred." *Scheiner*, 483 U.S. at 284. Review in No. 03-1234 is therefore warranted.

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[4] The court in *Boedecker* actually referred to the fee as a "license fee," 492 P.2d at 919, and it did not attach significance to nomenclature.

[5] Courts have also divided on the validity of the distinction in evaluating Commerce Clause claims. See pp. 14-15, *infra*.

3. If the Court grants review, however, it might wish to reformulate the question presented by limiting it to whether the SSRS preempts the fee imposed by Section 478.2(2). Petitioners' question encompasses both whether the SSRS preempts the interstate fee *and* whether the predecessor bingo card system had that effect before it was repealed a decade ago, in 1994. 03-1234 Pet. i. Although a similar analysis applies to both the SSRS and the bingo card system, and an understanding of the bingo card system provides helpful background for understanding the SSRS, the two sets of statutes and regulations are worded differently.[6] The preemptive effect of the bingo card system has some importance to the parties to this case because petitioners have sought a refund of fees paid before 1994 (03-1234 Pet. 7-8), but it does not appear to have any other ongoing significance.

B. The Validity Of Michigan's $100 Intrastate Fee Under The Commerce Clause Also Warrants This Court's Review

Petitioners in No. 03-1230 contend that the fee imposed by Section 478.2(1) of the Michigan statute is unconstitutional as applied to carriers that conduct both interstate and

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[6] Congress authorized the ICC to promulgate standards regarding registration and identification of vehicles operating interstate, and provided that requirements in excess of those standards would constitute an undue burden on interstate commerce. 49 U.S.C. 302(b)(2) (1970). The ICC's standards established the bingo card system described at p. 1, *supra*, and, at the times relevant to this case, specified that the fee for issuance of an identification stamp "shall not exceed $10." 49 C.F.R. 1023.33 (1992). Both the statute and the regulations stressed that they should not "be construed to affect the powers of taxation of the several States." 49 U.S.C. 302(b)(1) (1970); see 49 C.F.R. 1023.104 (1992). Although it might be contended that the latter provisions make the federal preemption issue different under the bingo card system than under the SSRS, the interstate fee was preempted under the bingo card system because it was precisely the type of fee regulated by that system, and it exceeded the lawful amount.

intrastate operations. 03-1230 Pet. i. In our view, that issue also warrants this Court's review.

1. The fee imposed by Section 478.2(1) affects interstate commerce. Interstate carriers that transport even one load between two points in Michigan, as part of their overall interstate operations, are assessed the full $100 intrastate fee. Thus, a truck that is passing through Michigan, in the course of an interstate haul, cannot "top off" by transporting an additional load between two points within the State unless it has paid the $100 fee. Similarly, a truck that has just completed an interstate delivery in Michigan cannot make a haul between two points in Michigan on its return trip unless it has paid the full $100 annual fee. See generally 03-1234 Pet. App. 34. As the Court of Appeals correctly recognized, the $100 fee "affects interstate commerce, and thus, implicates the dormant Commerce Clause." *Id.* at 32; see *Camps Newfound/Owatonna*, 520 U.S. at 573; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615-617 (1981).

2. Under the Commerce Clause, a state tax is constitutional insofar as it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). Petitioners contend (03-1230 Pet. 7-17, 20-27) that the fee imposed by Section 478.2(1) violates that test because it is not fairly apportioned and it discriminates against interstate commerce.

Petitioners rely in particular on *Scheiner, supra*. See 03-1230 Pet. 8-17. In that case, the Court held that two flat taxes (an identification marker fee and an axle tax) imposed by Pennsylvania on interstate trucking carriers for the privilege of using the Commonwealth's highways were unconstitutional, noting that "[i]f each State imposed flat taxes for

the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284. The Court explained that the "inevitable effect" of such taxes "is to threaten the free movement of commerce by placing a financial barrier around the State." *Ibid.* The Court distinguished such flat taxes from other exactions, such as fuel taxes, that are fairly apportioned because they are related to the carrier's actual usage of a State's roads, and thereby "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 283.[7]

3. Because the Michigan statute imposes a flat fee of $100 per vehicle for the privilege of doing business within the State, regardless of the amount of intrastate transportation a vehicle actually performs in the State, petitioners contend that its impact is similar to that of the taxes struck down in *Scheiner*. The Michigan Court of Appeals held that *Scheiner* is inapposite on the ground that this case involves what the court characterized as "regulatory statutes," as opposed to "state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state." 03-1234 Pet. App. 32 n.15 (citation omitted). This Court, however, has rejected "the old absolutism" that proscribed "taxation formally levied on interstate commerce." *Jefferson Lines*, 514 U.S. at 183. What matters is "not the formal language of the tax statute but rather its practical effect." *Ibid.* In substance and effect, the distinction drawn by the

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[7] *Scheiner* drew on "[a] line of cases invalidating unapportioned flat taxes." 483 U.S. at 284 n.16. In *Nippert* v. *Richmond*, 327 U.S. 416 (1946), for example, this Court re-affirmed its cases holding flat fees imposed on solicitors or "drummers" (essentially salespersons) acting on behalf of interstate concerns to be unconstitutional. The Court explained that because such taxes bear "no relation to the volume of business done or-of returns from it," their burden "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State." *Id.* at 427, 430.

Court of Appeals is meaningless: the intrastate fee is in effect a tax "for the privilege of doing business in the state" because an interstate carrier cannot make intrastate hauls in the State without paying the fee; whether the fee is characterized as "regulatory" has no bearing on its practical effect.

The Court of Appeals' attempt to distinguish *Scheiner* by characterizing the fee as "regulatory" brought it into conflict with the highest courts of New Jersey, Maine, and Massachusetts. Each of those courts expressly rejected the distinction between "regulatory fees" and other sorts of fees or taxes, and each held that a flat tax on the transportation of hazardous waste was unconstitutional under *Scheiner* as a matter of law. *American Trucking Ass'ns* v. *New Jersey*, 852 A.2d 142, 164 (N.J. 2004); *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014, 1015-1017 (Me. 1991); *American Trucking Ass'ns* v. *Secretary of Admin.*, 613 N.E.2d 95, 99 n.9, 101-103 (Mass. 1993).[8]

In contrast, other courts have credited the erroneous "regulatory fee" distinction relied upon by the Michigan court. See, *e.g.*, *Franks & Son, Inc.* v. *Washington*, 966 P.2d 1232, 1240 (Wash. 1998) (citing cases); cf. *New Jersey*, 852 A.2d at 162-163 (recognizing the conflict and deepening it by "respectfully disagree[ing]" with *Franks & Son* and other cases).

[8] Respondents seek to distinguish those cases on the ground that the fees at issue applied to both intrastate and interstate movements of hazardous waste, whereas the Michigan fee applies only to intrastate shipments. See 03-1230 Br. in Opp. 25. As explained at pp. 16-17, *infra*, that distinction is debatable as applied to interstate trucking carriers. The important point for present purposes is that although the decisions cited in the text held that *Scheiner* applies to state exactions whether they are characterized as "regulatory" fees or some other sort of fee or tax, the Michigan Court of Appeals embraced that very distinction and held *Scheiner* (and *Complete Auto*) inapplicable solely because it regarded Section 478.2(1) as a regulatory statute. See 03-1234 Pet. App. 32 n.15. It is perhaps significant, moreover, that the New Jersey, Maine, and Massachusetts courts did not strike down the fees only as applied to movements solely in interstate commerce, as the logic of respondents' distinction would seem to dictate. See 595 A.2d at 1018 (declaring fee unconstitutional in its entirety); 613 N.E.2d at 105 (same); 852 A.2d at 145, 167 (declaring fee unconstitutional as applied to out-of-state companies).

4. Although the Court of Appeals erred—and departed from decisions of other appellate courts—by relying on the "regulatory fee" distinction, respondents argue (03-1230 Br. in Opp. 17, 22) that *Scheiner* poses no barrier to their collection of the fee for a different reason: that while the taxes at issue in *Scheiner* applied to all trucks traveling within the State, the fee imposed by Section 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan, and presents no danger of multiple taxation of those hauls.

That contention finds support in an older line of this Court's cases that subjected flat taxes on transportation companies' intrastate routes to more relaxed scrutiny than taxes on their interstate routes. In *Osborne* v. *Florida*, 164 U.S. 650, 653-654 (1897), for example, this Court assumed that a flat license tax on express companies would have been unconstitutional if applied to companies undertaking solely interstate deliveries, but upheld the tax as applied to companies undertaking both intrastate and interstate deliveries on the theory that the State could tax the intrastate activity. Noting that a "company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," the Court likewise upheld a partially-flat tax against companies operating railroad sleeping cars that carried both intrastate and interstate passengers in the same cars. *Pullman Co.* v. *Adams*, 189 U.S. 420, 422 (1903).[9]

[9] The Court similarly upheld a flat tax on all vehicles using Illinois' highways on the theory that "each of the [plaintiff] interstate carriers does an intrastate business as well," and "[n]o effort is made to show that * * * the tax is increased by reason of the interstate operations of any appellant." *Bode* v. *Barrett*, 344 U.S. 583, 585 (1953); cf. *City of Chicago* v. *Willett Co.*, 344 U.S. 574, 580 (1953) (upholding flat tax on trucks used to

The continued vitality of those older decisions may be subject to question in light of this Court's decisions in *Complete Auto* and *Scheiner*, which overruled a number of earlier formalist decisions in favor of a more practical framework focusing on the actual effect of a tax. See 430 U.S. at 287-289; 483 U.S. at 292-296. Under this Court's modern precedents, Michigan's fee is constitutional only if it is fairly apportioned, non-discriminatory, and fairly related to the services provided by the State. *Jefferson Lines*, 514 U.S. at 183.[10] *Scheiner* determined that the unapportioned flat taxes at issue in that case were "blatantly discriminatory" and not "even hand[ed]" as applied to out-of-state trucking carriers because they bore no relationship to a carrier's actual use of the State's roads, and thereby "threaten[ed] the free movement of commerce by placing a financial barrier around the State." 483 U.S. at 282, 284, 292; see pp. 12-13, *supra*. Similar concerns may be raised by Michigan's intrastate fee under Section 478.2(1) insofar as it is imposed on carriers engaged in interstate as well as intrastate commerce, because the cost-per-mile incurred by those carriers for engaging in intrastate commerce within Michigan would generally be higher than the cost-per-mile incurred by wholly intrastate carriers for engaging in the same commerce. Cf. *Scheiner*, 483 U.S. at 276, 286, 296-297. The effect could be to place interstate carriers at a competitive disadvantage if they sought to "top off" an interstate load or haul a load between two points in Michigan after completing (or before commencing) an interstate haul. The carrier's interstate transportation could also be adversely affected as a result. The

carry intrastate and interstate loads simultaneously based on the "central and decisive fact" that the business was based in the taxing jurisdiction).

[10] The less demanding test applied to health, safety, and other regulations that impose only "incidental burdens" on interstate commerce likewise requires that a State regulate "evenhandedly." *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

record, however, does not fully establish the extent of any such competitive disadvantage or burden on interstate commerce.[11]

5. However the Court might ultimately resolve any tension between *Scheiner* and the *Osborne* line of cases—and the United States has not arrived at a definitive position on that point—the question presented in No. 03-1230 warrants review. That is especially so because the Michigan Court of Appeals erred by resolving that question by characterizing the fees at issue as "regulatory," and because there is a need for this Court's review of the related question of the validity of Michigan's interstate fee under the SSRS. Indeed, Congress's determination in the SSRS that a fee exceeding $10 for interstate hauls would unduly burden interstate commerce suggests that a charge ten times that amount for "topping off" an interstate load warrants review by the Court. As noted above, this Court has repeatedly granted review in dormant Commerce Clause cases even in the absence of a conflict in the lower courts, and in this instance the lower courts are in need of guidance. See pp. 9-10, 14-15, *supra*.

[11] An affidavit submitted on behalf of petitioner USF Holland (then called TNT Holland Motor Express) states that the company's trucks often supplement their interstate loads by either topping off those loads with intrastate loads, or by hauling intrastate loads between interstate loads. 03-1234 Pet. App. 34. That affidavit suggests that in this inherently mobile industry, interstate and intrastate routes may often be undertaken together as part of a carrier's overall interstate operations. The record does not, however, reflect the overall extent to which Michigan's flat fee actually deters out-of-state carriers from competing for intrastate hauls in Michigan, or the extent to which the fee otherwise affects out-of-state carriers disproportionately or burdens interstate commerce. Accordingly, if the Court grants review in No. 03-1230 and articulates a general framework for analyzing fees such as the one imposed by Section 478.2(1) under the Commerce Clause, the Court may find it appropriate then to remand this case to the Michigan courts for application of that framework, including the development of any further factual record that may be necessary.

C. The Petition In No. 03-1250 Does Not Warrant Certiorari

The petition in No. 03-1250 presents the question whether Michigan's intrastate fee, as applied to *all* carriers conducting intrastate hauls—solely intrastate and mixed carriers alike—is preempted by Section 601 of the FAAAA. That statute prohibits a State from enacting or enforcing any law "related to a price, route, or service of any motor carrier * * * with respect to the transportation of property." 49 U.S.C. 14501(c)(1). Congress enacted that provision to end economic regulation of the trucking industry. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 440 (2002). Although Section 601's preemption of economic regulation is broad and important,[12] we do not believe the petition presents a sufficiently substantial issue to warrant review.

In general, the mere levying of a fee is not "related to a price, route, or service of any motor carrier" for purposes of Section 601. 49 U.S.C. 14501(c)(1). In theory, *any* tax or fee might cause a carrier to raise its price or alter its operations, but the same could be said of safety or insurance requirements, or other non-economic regulations, and Congress made clear that it did not intend to sweep so far. See 49 U.S.C. 14501(c)(2) (exempting safety regulation, insurance requirements, and other matters from the scope of Section 601). Without more, therefore, any connection between the assessment of a fee and the prices, rates, or services of a carrier is "too tenuous, remote, or peripheral" to give rise to preemption. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992).

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[12] Congress modeled Section 601 on a similar provision of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4, 92 Stat. 1708, which this Court has described as "expres[ing] a broad pre-emptive purpose." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); see H.R. Conf. Rep. No. 677, 103d Cong., 2d Sess. 83 (1994).

Petitioners contend (03-1250 Pet. 16-17) that because Michigan imposed the intrastate fee in support of economic regulation before Congress enacted Section 601, it must now repeal that fee along with the other aspects of its economic regulatory regime. There is no apparent basis for this "guilt by association" theory. Michigan would violate Section 601 if, for example, it were to regulate the prices charged by trucking companies, but that does not mean that otherwise lawful fees charged before deregulation may not be charged after deregulation to support government programs that remain lawful, including safety programs. A different case might be presented if the fee substantially exceeded the amount Michigan required to administer lawful programs, but petitioners failed to develop a record below showing that the fee is not related to a permissible purpose.

It might also be argued that although the fee is lawful as applied to carriers that conduct solely intrastate operations in Michigan, it is preempted as applied to interstate carriers because the fee acts as a barrier to entry, and thereby affects "routes" and inhibits interstate operators from offering "services" for intrastate hauls. But none of the petitioners presented that distinct claim in the state courts or in their petitions to this Court. As a result, it is not suitable for review in this case.

CONCLUSION

The petition for a writ of certiorari in No. 03-1234 should be granted, limited to the question whether the fee imposed by Mich. Comp. Laws Ann. § 478.2(2) is preempted by 49 U.S.C. 14504. The petition for a writ of certiorari in No. 03-1230 should be granted. The petition for a writ of certiorari in No. 03-1250 should be denied.

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Nos. 03-1230 and 03-1234

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.
AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

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In addition, the following document may be found in the Appendix to the Petition for Writ of Certiorari in No. 03-1230:

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State of Michigan
Court of Claims
Docket No. 95-15631-CM

Troy Cab, Inc., *et al.* vs. State of Michigan, *et al.*

January 9, 1995	Complaint
February 21, 1995	Motion to Intervene of American Trucking Associations and TNT Holland Motor Express
April 26, 1995	Order of Reassignment from Judge Brown to Judge Giddings and consolidating the file and all future pleadings in Docket No. 95-15628-CM
May 2, 1995	Case reassigned from Judge Brown to Judge Giddings

State of Michigan
Court of Claims
Docket No. 95-15628-CM

Westlake Transportation, Inc., *et al.* vs.
Michigan Public Service Commission, *et al.*

January 3, 1995	Complaint
February 15, 1995	Amended Complaint
February 21, 1995	Motion to Intervene and Complaint of American Trucking Associations and TNT Holland Motor Express
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May 9, 1995	Amended Complaint of Intervening Plaintiffs American Trucking Associations and TNT Holland Motor Express
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January 13, 1999	Motion for Reconsideration
March 8, 2000	Order denying Motion for Reconsideration
March 24, 2000	Claim of Appeal to the Michigan Court of Appeals filed by Plaintiffs Westlake Transportation and Troy Cab, *et al.*
March 29, 2000	Claim of Appeal to the Michigan Court of Appeals filed by Intervening Plaintiffs American Trucking Associations and TNT Holland Motor Express

Michigan Court of Appeals/Supreme Court
Court of Appeals Case Nos.
226052; 226122; 226053; 226137
Supreme Court Case Nos. 123562-5; 123566-7

Westlake Transportation, Inc., *et al.* vs.
Michigan Public Service Commission, *et al.*

March 21, 2000	Claim of Appeal filed by Westlake Transportation and Troy Cab, *et al.*
March 27, 2000	Claim of Appeal filed by American Trucking Associations and TNT Holland Motor Express
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April 2, 2001	Brief of Appellee
April 19, 2001	Reply Brief filed by American Trucking Associations and TNT Holland Motor Express
April 23, 2001	Reply Brief filed by Westlake Transportation and Troy Cab, *et al.*
March 11, 2003	Michigan Court of Appeals Opinion – judgment affirmed
April 1, 2003	Applications for Leave to Appeal to the Michigan Supreme Court filed by Westlake Transportation and Troy Cab, *et al.* and American Trucking Associations and TNT Holland Motor Express

January 3, 2004	Orders denying leave to appeal to the Michigan Supreme Court
March 8, 2004	Notice of Docketing Petitions for Writ of Certiorari in U.S. Supreme Court Nos. 03-1230 and 03-1234

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., VAN DER KOOI CARRIERS, INC., PRISM TRUCKING, INC., BESTWAY EXPRESS, INC., GERIG'S TRUCKING & LEASING, INC. and MYRIAH, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

and

AMERICAN TRUCKING ASSOCIATIONS, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening-Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, its COMMISSIONERS, JOHN G. STRAND, RONALD E. RUSSELL and JOHN L. O'DONNELL, MICHIGAN DEPARTMENT OF TREASURY and its STATE TREASURER and the STATE OF MICHIGAN,

Defendants.

File No. 95-15628 CM
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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, states the following:

1. I am Director of the Motor Carrier Regulation Division, Michigan Public Service Commission, the address being 1048 Pierpont, Suite 4, Lansing, Michigan 48909.

2. The Motor Carrier Regulation Division, pursuant to Article IV of the Motor Carrier Act, collects the fees which plaintiffs allege are unlawful, the intrastate vehicle fee, MCL 478.2(1) and the interstate vehicle fee, MCL 478.2(2). Payment of these fees result in the issuance by the MPSC of a vehicle specific decal which is displayed on the door of each vehicle.

3. The intrastate vehicle fee of $100 is required for all vehicles used in the motor carrier's intrastate operations regardless of what state or Canadian province the vehicle may be commercially registered or licensed by the equivalent of the Michigan Secretary of State. The interstate vehicle fee of $100 is required only if the vehicle is commercially registered and licensed by the Michigan Secretary of State. The vehicle decal is identical in appearance for both intrastate and interstate vehicles (See attachment of photocopy). If the vehicle is used in both intrastate and interstate operations, only one decal and one fee payment is required.

4. I have had prepared, by staff members under my supervision, a review of the fees paid by the plaintiffs in this action to the Michigan Public Service Commission for the calendar years 1992, 1993, 1994 and 1995. This data has been gathered from Commission records as of March

17, 1995. The results of this review are contained in the following paragraphs.

5. Bestway Express, Inc. has held no Michigan intrastate authority during the years 1992-1995. It has paid no $100 vehicle decal fees for intrastate operations during the years 1992-1995. It has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

6. Gerig's Trucking and Leasing, Inc. has held no Michigan intrastate operating authority during the years 1992-1995. It has paid no $100 vehicle decal fees for intrastate operations during the years 1992-1995. It has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

7. Westlake Transportation, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operation during the years 1992-1995:

1992 –	$100	1994 –	$4,750
1993 –	$3,800	1995 –	$4,900

Westlake has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

8. Van Der Kooi Carriers, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operation during the years 1992-1995:

1992 –	$900	$1994 –	$900
1993 –	$700	$1995 –	$300

Van Der Kooi has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

9. Prism Trucking, Inc. held no Michigan operating authority in 1992 or 1993. It has held Michigan operating authority since 1994. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995.

1992 –	0	1994 –	$200
1993 –	0	1995 –	$500

Prism has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

10. TNT Holland Motor Express, Inc. has held Michigan intrastate operating authority for each of the years 1992-1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995:

1992 –	$118,272	1994 –	$148,700
1993 –	$135,513	1995 –	$117,220

TNT Holland has paid no $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles.

11. Myriah, Inc. held no Michigan intrastate operating authority in 1992, 1993 or 1994. It acquired Michigan operating authority in January of 1995. It has paid the following amounts for $100 vehicle decal fees for intrastate operations during the years 1992-1995:

1992 –	0	1994 –	0
1993 –	0	1995 –	$500

Myriah has paid $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles in the following amounts:

1992 –	$300	1994 –	$100
1993 –	$100	1995 –	0

12. El Toro Motor Freight, Inc. held no Michigan intrastate operating authority in 1992, 1993 or 1994. It acquired Michigan operating authority in February of 1995. As of March 17, it had paid no $100 intrastate vehicle decal fees for 1995, nor had it paid any in 1992, 1993 or 1994. El Toro has paid $100 vehicle decal fees for interstate operations utilizing Michigan registered vehicles in the following amounts:

1992 –	$1,773	1994 –	$1,979
1993 –	$2,860	1995 –	$3,200

13. All of the fees mentioned in the preceding paragraphs #4 through 11 are in increments of $100.00. Partial year (six months or less) decals may also be purchased for $50.00 In the preceding paragraphs, some revenue amounts are in irregular amounts. These dollar amounts were extracted from state accounting records but apparently include occasional errors, either in recording information or in posting revenue to the wrong accounts.

14. A motor carrier does have a choice as to the state in which it may wish to commercially register its vehicles. For example, some motor carriers based in Michigan may register their trucks in Illinois. But, in any event, an individual vehicle will receive license plates from only one State. Therefore, it would not be possible for an individual truck to pay multiple fees if the fee is applied based upon the state of vehicle licensure.

15. In the fiscal year 1993-94, the decal fee revenue collected pursuant to MCL sections 478.2(1) and 478.2(2) was $3.65 million. Total motor carrier fee revenue collected by the MPSC from all sources was $6.25 million, including $2.1 million collected from the $10.00 interstate vehicle fee, section 478.7(4). The distribution of this revenue is via appropriations by the Michigan legislature to the Department of Commerce, the Public Service Commission, the Michigan State Police and the Michigan Truck Safety Commission in the following amounts for fiscal 1993-94:

State Police	$2.63 million
Department of Commerce	$566 thousand
Public Service Commission	$2.16 million
Truck Safety Commission	$766 thousand

These revenues are utilized by the respective agencies for economic, insurance, and safety regulation of the Michigan trucking industry, safety education programs, and for enforcement of both the Michigan Motor Carrier Act and the Michigan Motor Carrier Safety Act, MCL 480.11 et al. Examples of safety enforcement include traffic enforcement such as speeding, vehicle inspections, alcohol and drug testing enforcement, hazardous materials, oversize and overweight enforcement and driver log book enforcement. The Motor Carrier Division of the State Police was, until 1982, a part of the Public Service Commission. When this division was transferred to the State Police by Executive Order 1982-1, funding support from PSC revenues sources was continued to the present time. The safety regulation responsibilities are applied equally to intrastate and interstate motor carriers while the economic regulation responsibilities apply primarily to intrastate

motor carriers, although the MPSC does have responsibility for insurance compliance by interstate motor carriers based in Michigan. It has been estimated that of the funds provided to the State Police prior to January 1, 1995, in excess of 90% has been used for safety enforcement and less than 10% for economic regulatory enforcement. In the Motor Carrier Regulation Division of the PSC prior to January 1, 1995, approximately 43% was spent for economic regulation, 25% for safety and insurance compliance and 32% for revenue collection. After January 1, 1995, this expenditure pattern has begun changing as some economic regulation will phase out. The result will be a reallocation of funding to safety purposes or a fee reduction if implemented by the legislature.

16. Paragraph #9 of Van Der Kooi's affidavit filed with Westlake's motion for class certification (and in similar statements in each of the other six affidavits) suggests that Michigan's interstate fee system could be adopted nationwide resulting in multiple fees. Note that the Michigan's interstate fee system is only applied to vehicles commercially licensed in Michigan. Even if every state adopted the same system, an individual motor carrier would pay the fee only once, in the state in which it voluntarily becomes commercially licensed.

17. Paragraph #6 of Myriah's and El Toro's affidavits indicates that they paid $100 interstate decal fees for each of its vehicles used exclusively for interstate transportation. Myriah and El Toro could have avoided those fees by registering its vehicles in another state.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before me
this 23rd day of March, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN

IN THE COURT OF CLAIMS

WESTLAKE
TRANSPORTATION, INC.,
et al,

Plaintiffs,

v

MICHIGAN PUBLIC
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Defendants. /

File No. 95-15628 CM
Hon. James R. Giddings

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SERVICE COMMISSION,
et al,

Defendants. /

File No. 94-15631 CM
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AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the

administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et *seq*, the title to which begins as follows:

"AN ACT *to promote safety upon and conserve the use of public highways* of the state; . . . ". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: . . . (b) *protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways*;. . . . " (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> " . . . To provide for the levy and collection of certain privilege fees and taxes for such carriers *for such purposes* and the disposition of such fees and taxes; . . . ". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> " . . . to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; . . . "

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; . . . (i) prevent unjust discrimination; . . . (k) provide and maintain service to small communities and small

> shippers; . . . (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; . . . "

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (***Exhibit A***) the general jurisdiction of the Interstate Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates,

routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (***Exhibit B***) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The

remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an *intrastate* MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a

listing is attached as ***Exhibit E***. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission collected a weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1),

is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a

maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as ***Exhibit C***. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to

promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another state is a fee that vehicles which are license plated in Michigan are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See ***Exhibit B*** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

SINGLE STATE REGISTRATION

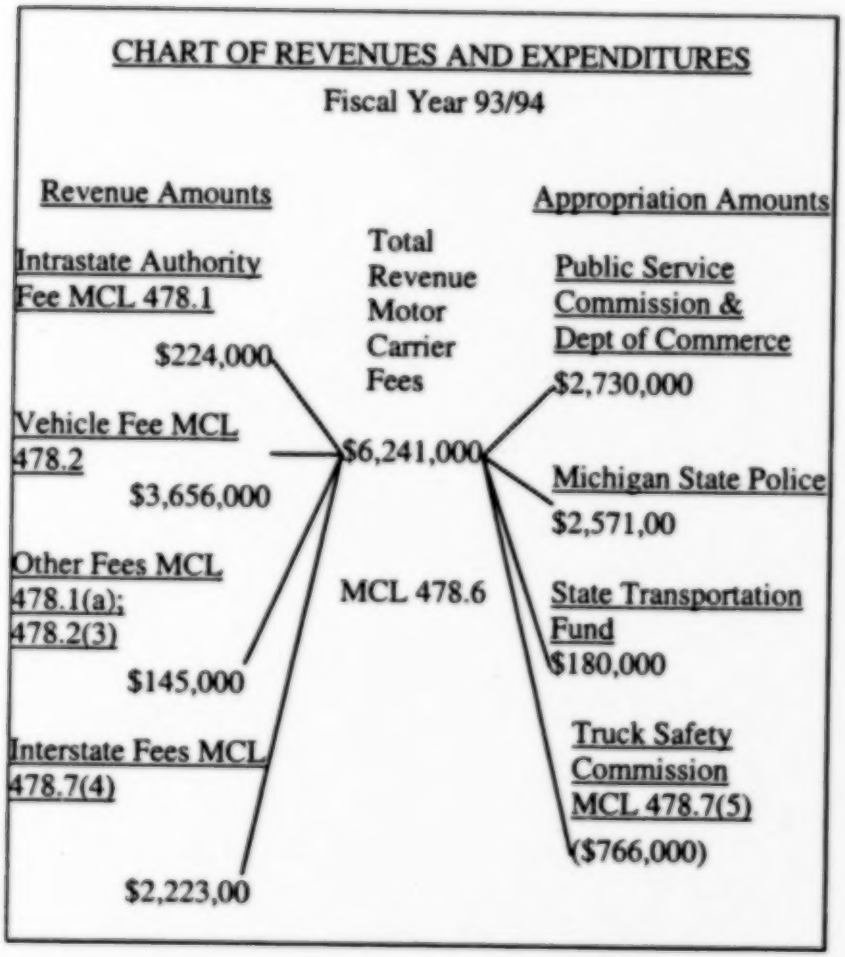
20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does *not* relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before

commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

> (1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as ***Exhibit D***. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records

regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to uniform cargo liability rules, uniform bills of lading, uniform cargo credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision ... *related to a*

price, route, or service" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.

Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:

> "[S]hall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]

Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more

burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to *economic* trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of *Federal Express Corp* v *California Public Utilities Comm*, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that *State authority to regulate safety, financial fitness and insurance*, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as liability rules, antitrust immunity to publish documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second, . . . safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective

motor carrier must show that it is fit – which is defined as being safe, suitable, and financially responsible – and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to

demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate

and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws. The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act. Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. *Safety and Compliance*: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. *Rates and Tariffs*: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. *Authorities*: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents

and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. *Revenue Collection and Issuance of Credentials*: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but prior to preemption utilized 10 staff positions.

e. *Management*: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See ***Exhibit B***).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority.

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me
this **14th** day of **September, 1995.**

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

File No. 95-15628 CM
Hon. James R. Giddings

TROY CAB, INC., et al,

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AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including the provisions of the Motor Carrier Act

(Act No. 254 of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor

carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways

and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration, operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

/s/ Timothy J. Yungfer
Captain Timothy J. Yungfer

Subscribed and sworn to before me
this 14th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
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v

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants. /

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TROY CAB, INC., et al,

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SUPPLEMENTAL AFFIDAVIT
OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

/s/ Timothy J. Yungfer
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforcement	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

* Fiscal Year 1994/95 are projected through year end. Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs

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SUPPLEMENTAL AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant has reviewed the Affidavit signed September 14, 1995 and notes that the last sentence of Paragraph 50 should be changed to read as follows:

> The American Trucking Association for years has fought against weight-distance taxes as being too inefficient and difficult to administer.

2. Affiant's September 14, 1995 Affidavit also inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant could testify competently to the facts stated in the Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

4. Affiant submits that Plaintiffs mistakenly compare the federal limitations under the *Single State Registration System* (SSRS) on the state requirement that interstate carriers register their ICC authority with Michigan with Michigan's requirements [MCL 478.2(2)] that interstate carriers, licensed in this state, shall pay $100 for each vehicle "registered in this state and operating entirely in interstate commerce." Michigan's requirement that interstate carriers register their ICC authority is covered by MCL 478.7(4). Under the SSRS "registration" refers to registering ICC authority with the states. Under 478.2(2), a vehicle is "registered" in this state if it is commercially plated and registered in Michigan under the Vehicle Code or International Registration Plan (IRP).

5. The Single State Registration System (SSRS) allows states to charge interstate motor carriers $0-$10 per vehicle to register their ICC authority with a state. (MCL 478.2)2) charges interstate carriers for safety regulation or as stated in MCL 478.2 "for the administration of this act," $100 per vehicle but only on vehicles which display Michigan license plates. As the Director of

the Motor Carrier Division of the Michigan Public Service Commission which is responsible for the administration of the Motor Carrier Act, affiant assures the Michigan Public Service Commission that the MMCA is in compliance with federal law. To affiant's knowledge, Congress has never stated that the SSRS would prohibit or limit states power to tax motor carriers. See my original affidavit, Appendix 4, paragraph 9 and Exhibit A for explanation of our dual system of federal and state regulation, coupled with a copy of the general jurisdiction statute of the ICC, 49 USC section 10521 wherein it states:

> "This subtitle *does not*"
>
> . . .
>
> (1) except as provided in sections 10922(c), 10935, 10936, 11501(e), and *11501(h)* of this title, *affect the power of a state to regulate intrastate transportation provided by a motor carrier*;
>
> . . .
>
> (4) except as provided in sections 11503(a) and section 11504(b) of this title, *affect the taxation power of a state over a motor carrier*. (emphasis added).

6. The SSRS is found in section 11506 of the Interstate Commerce Act and is not mentioned as an exception and therefore is not a limitation on the states taxation power in section 10521(4), but the FAAA Act, 11501(h) is an expressed exception and therefore a limitation on the power of states to regulate intrastate transportation by motor carriers as contained in section 10521(1). If Congress intended to limit the taxation power of the states through the SSRS, section 11506, they would have included it as an exception to 49 USC 10521(4). Congress

certainly included the 1994 FAAA Act section 11501(h) as a limitation on states power to regulate intrastate transportation by including it in 49 USC 10521(1).

7. The SSRS fee of $0-$10 is levied by each state in which an interstate vehicle travels. The more states the vehicle travels through, the more the gross amount of the fee, which is then allocated among the states. However, Michigan does not collect the $10 fee for Michigan travel of an interstate vehicle if the vehicle has paid a $100 fee under either 478.2(1) (vehicles using intrastate authority) or 478.2(2) (vehicles licensed and registered in Michigan). Historically, the Michigan Public Service Commission has interpreted MCL 478.2(2)'s applicability requirement of "vehicles registered in Michigan" to mean vehicles which have Michigan license plates obtained through the Michigan Secretary of State.

8. Affiant submits that motor carriers such as TNT Holland are often referred to as "less-than-truckload" carriers. This refers to the method of operation that involves three phases. Phase one is the pickup phase in which trucks based at a terminal makes numerous small shipment pickups in an adjacent geographical area and returns these shipments to the terminal where they are unloaded. Phase two involves the "line-haul" in which shipments destined for another terminal location are consolidated and loaded on a truck for delivery to the remote terminal where the truck is once again unloaded. The third phase would be the delivery phase in which trucks based at the terminal deliver the various shipments in the adjacent geographical area. These shipments could consist of either interstate or intrastate shipments or both. However, in the case of TNT Holland with its network of seven Michigan terminals, substantial quantities of freight

would be strictly intrastate. It is also a common industry practice to dedicate a truck and driver to the same pickup, linehaul or delivery route. For example, the daily line-haul between Detroit and Grand Rapids would normally involve the same driver and probably the same truck each day.

9. The affidavit submitted by Mr. Crozier suggests a method of operation which differs from the typical less-than-truckload motor carrier and does not comport with MPSC staff's understanding of TNT Holland's method of operation.

10. The situation described by Mr. Crozier whereby vehicles operate in both interstate and intrastate commerce, and with intrastate shipments merely "topping off" trailer loads is not common and not applicable to an evaluation of 478.2(1) because:

(a) a majority of carriers or vehicles subject to the $100 fee in 478.2(1) are strictly intrastate only;

(b) those engaging in both intrastate and interstate commerce can pay $100 per vehicle pursuant to MCL 478.2(1) for intrastate vehicles and $10 or less for interstate vehicles pursuant to MCL 478.7(4) which is consistent with the federal SSRS.

(c) a carrier selects how to apportion vehicles as to interstate and intrastate business based on his own business judgement and circumstances;

(d) many, if not most routes, drivers, and trucks are fixed and routine, thereby allowing an informed business judgement as to appropriate regulation and fees;

(e) a driver and truck operating on a linehaul interstate route would normally not concern itself with pickup or delivery of a shipment in an intervening state, even for purposes of "topping off" a load as this would disrupt schedules and normal shipment patterns.

11. This Supplemental Affidavit is made on affiant's personal knowledge, and if sworn as a witness, affiant can testify competently to the facts stated in this Supplemental Affidavit.

Further, Affiant sayeth not.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before me
this 21st day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

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SECOND SUPPLEMENTAL AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. That in response to the Supplemental Affidavit of James C. Crozier, section 478.2(3) of the Motor Carrier Act allows for issuance of 72 hour (3 day) permits for a cost of $10.00. Therefore, a motor carrier that is only involved in occasional or incidental intrastate commerce would not have to pay $100 per vehicle pursuant to MCL 478.2(1). When an intrastate business opportunity arises, a motor carrier can obtain a $10.00 temporary permit. A motor

carrier could operate for up to 30 days using the 10 cards before reaching the equivalent of the $100 decal fee.

2. Plaintiffs suggest that the $100 per vehicle fee [478.2(1)] must be apportioned in some manner, such as mileage, but there is no data accumulation system available which could be used to separate miles traveled intrastate versus interstate. MCL 478.2(1) is based on transportation of intrastate shipments, and although the IRP requires motor carriers to declare in advance the number of miles traveled by each vehicle in each state, there is no declaration of intrastate miles charged. Therefore, the IRP system could not be used for mileage data of intrastate operations.

To devise a system based upon mileage would require accumulated data as to the number of intrastate shipments, the weight of such shipments, etc. to reach a reasonable apportionment of interstate versus intrastate revenue. This would make telephone service separations look simple. Both the motor carriers and the State of Michigan would need to devise complex systems for determining fee liability, billing, auditing and so forth. This approach appears to be administratively inefficient for the amount of fee revenue collected per year, approximately $3.5 million involving 3,000 motor carriers.

Further, affiant sayeth not.

/s/ Thomas R. Lonergan
Thomas R. Lonergan

Subscribed and sworn to before
me this 28th day of September, 1995.

/s/ Carol Ann Dane
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

UNIFORM APPLICATION FOR SINGLE STATE REGISTRATION FOR MOTOR CARRIERS OPERATING UNDER AUTHORITY ISSUED BY THE INTERSTATE COMMERCE COMMISSION

Motor Carrier Identification Numbers — Application for Property Carriers Only

ICC MC Number(s):	US DOT Number:	FEIN Number:

Applicant (identical to name on ICC order)

Name:	Doing Business As (D/B/A):
Telephone Number:	Fax Number:

Address of Principal Place of Business: (A principal place of business is a single location that serves as a motor carrier's headquarters and where it maintains or can make available its operational records.)

Number and Street:	City:	State:	ZIP Code:

Mailing Address if Different from Business Address Above:

Number and Street:	City:	State:	ZIP Code:

Type of Registration: Passenger Carriers cannot register under Single State Registration in Michigan. Call 517/335-2475.

- ☐ **New Carrier Registration** – The motor carrier has not previously registered.
- ☐ **Annual Registration** – The motor carrier is renewing its annual registration.
- ☐ **New Registration State Selection** – The motor carrier has changed its principal place of business or its prior registration State has left the registration program. The prior registration state was _____

Type of Motor Carrier (check one):

☐ Individual ☐ Partnership ☐ Corporation – Enter state in which incorporated _____

List name and title of partners or officers:

_____ (Name) _____ (Title)

_____ (Name) _____ (Title)

_____ (Name) _____ (Title)

Type of ICC Registered Authority:

☐ Permanent Certificate or Permit ☐ Temporary Authority (TA) ☐ Emergency Temporary Authority (ETA)

Expiration Date: _____

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Type of Motor Carrier Operation: (check one only)

- ☐ **Transporter of Property** – Using freight vehicles with a gross vehicle weight rating of 10,000 pounds or more.
- ☐ **Transporter of Property** – Using only freight vehicles with a gross vehicle weight rating of less than 10,000 pounds.
- ☐ **Transporter of Passengers** – Using vehicles with a seating capacity of 16 passengers of more.
- ☐ **Transporter of Passengers** – Using only vehicles with a seating capacity of 15 passengers or less.

ICC Certificate(s) or Permit(s):

- ☐ ICC Authority Order(s) attached for first year registration.
- ☐ ICC Authority Order(s) attached for additional authority received.
- ☐ No change from prior year registration.

Proof of Public Liability Security:

- ☐ The applicant or its insurance company will file a copy of its proof of public liability security to the registration state.
- ☐ The applicant or its insurance company has filed a copy of its proof of public liability security with the registration state and the insurance coverage as stated on that form remains in effect.
- ☐ The applicant has an approved self-insurance plan or other security in full force and effect and the carrier is in full compliance with the conditions imposed by the ICC order. A copy of the ICC insurance order is attached or has previously been filed with the registered state.

Hazardous Materials: (check one)

- ☐ The applicant ***will not haul*** hazardous materials in any quantity.
- ☐ The applicant ***will haul*** hazardous materials requiring ***$1 million*** of Public Liability and Property Damage insurance in accordance with Title 49 CFR 1043.2.
- ☐ The applicant ***will haul*** hazardous materials requiring ***$5 million*** of Public Liability and Property Damage insurance in accordance with Title 49 CFR 1043.2.

Process Agent:

- ☐ ICC form Number BOC–3 or blanket designation attached for new registration.
- ☐ ICC form Number BOC–3 or blanket designation attached reflecting changes of designation of process agent.
- ☐ No change from prior year registration.

Certification:

I, the undersigned, under penalty for false statement, certify that the above information is true and correct and that I am authorized to execute and file this document on behalf of the applicant. (Penalty provisions subject to the laws of the registration state.)

_____ _____

Name (Printed) Date

_____ _____

Signature Title

CALCULATION OF FEE AMOUNTS DUE EACH STATE

Transporting: ☐ Property ☐ Passenger – Charter ☐ Passenger – Regular Route

For property transporting only. Passenger carriers contact the Michigan Department of Transportation at 517/335-2475.

Designated base state: ***MICHIGAN***

Name:	FAX Number:	ICC Number:

(A) Participating States	(B) Total Number of Vehicles	(C) Per Vehicle Fee		(D) Fee Times Number of Vehicles (Column B x C)
		Michigan Based	Quebec/Ontario Based	
Alabama		$ 6.00	$ 6.00	$
Arkansas		5.00	5.00	
California		0.00	5.00	
Colorado		5.00	5.00	
Connecticut		10.00	10.00	
Georgia		5.00	5.00	
Idaho		2.00	2.00	
Illinois		0.00	7.00	
Indiana		0.00	10.00	
Iowa		1.00	1.00	
Kansas		10.00	10.00	
Kentucky		10.00	10.00	
Louisiana		10.00	10.00	
Maine		8.00	8.00	
Massachusetts		10.00	10.00	
Michigan *		10.00	0.00	
Minnesota		.45	5.45	
Mississippi		10.00	10.00	
Missouri		0.00	10.00	
Montana		5.00	5.00	
Nebraska		0.50	3.50	
New Hampshire		10.00	10.00	
New Mexico		10.00	10.00	
New York		10.00	10.00	
North Carolina		0.00	1.00	
North Dakota		10.00	10.00	
Ohio		5.00	5.00	
Oklahoma		7.00	7.00	
Rhode Island		8.00	8.00	
South Carolina		5.00	5.00	
South Dakota		5.00	5.00	
Tennessee		8.00	8.00	
Texas		0.00	10.00	
Utah		6.00	6.00	
Virginia		10.00	10.00	
Washington		10.00	10.00	
West Virginia		3.00	3.00	
Wisconsin		5.00	5.00	

TOTAL OF ALL STATE FEES..... $

Note: Fees must be paid for each vehicle for each state of travel. Make check or money order (in U.S. funds) payable to the State of Michigan and mail to: Michigan Department of Commerce, Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, MI 48909-7721. If you have any questions about completing this form, please contact the Motor Carrier Unit at 517/334-7160 or 517/334-7154.

* Vehicles base-plated in Michigan need not be listed on the "Michigan" line above. Michigan based ICC carriers with vehicles based outside of Michigan must register these vehicles on this form at a fee of $10.00 per vehicle. Vehicles based in Michigan are required to have a $100.00 MPSC decal (Household Goods carriers $50.00). Use Equipment List (form P-344-T) to order MPSC decals.

STATE OF MICHIGAN

COURT OF APPEALS

WESTLAKE TRANSPORTATION, INC., VANDERKOOI CARRIERS, INC., EL TORO MOTOR FREIGHT, INC., MYRIAH, INC., PRISM, INC., GERRIGS TRUCKING & LEASING, INC., and BEST WAY EXPRESS, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC. and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, and the STATE OF MICHIGAN,

Defendants-Appellees.

FOR PUBLICATION
March 11, 2003
9:00 a.m.

No. 226052; 226122
Court of Claims
LC No. 95-015628-CM

TROY CAB, INC., DEECO SERVICES, INC., d/b/a DEECO TRANSPORTATION, TIBERIO FRANK, d/b/a FAIRFIELD TOWING, ELEX, INC., d/b/a LAFOND EXPRESS, DALE CONSTINE & SONS, INC., CALCUT SALES & SERVICES, INC., d/b/a CALCUT TRUCKING COMPANY,

AMBASSADOR TRANSPORTATION, INC., HAWKINS STEEL CARTAGE, INC., MIDCON FREIGHT SYSTEMS, INC., JLH TRANSFER, INC., H & H ENTERPRISES, INC., d/b/a S & M CARTAGE, INC., CENTRAL TRANSPORT, INC., BANCROFT TRUCKING COMPANY, US TRUCK COMPANY, INC., WEST END CARTAGE, INC., CENTRAL CARTAGE COMPANY, CTX, INC., MOHAWK MOTOR MICHIGAN, INC., ECONOMY TRANSPORT, INC., MCKINLAY TRANSPORT LIMITED, MASON & DIXON LINES, INC., UNIVERSAL AMCAN LIMITED, ROMEO EXPEDITERS, INC., TOM THUMB SERVICES, INC., d/b/a REI, OJ TRANSPORT COMPANY, JLAW ENTERPRISES INC., and OJ TRANSPORT, INC.,

Plaintiffs-Appellants,

and

AMERICAN TRUCKING ASSOCIATION, INC., and TNT HOLLAND MOTOR EXPRESS, INC.,

Intervening Plaintiffs-Appellants,

v

MICHIGAN PUBLIC SERVICE COMMISSION, DEPARTMENT OF TREASURY, DEPARTMENT OF COMMERCE, and the STATE OF MICHIGAN,

Defendants-Appellees.

No. 226053; 226137
Court of Claims
LC No. 95-015631-CM

Updated Copy
May 9, 2003

Before: Markey, P.J., and Saad and Smolenski, JJ.

SMOLENSKI, J.

In these consolidated class actions, plaintiffs, individual class-representative trucking companies, and intervening plaintiffs, two trucking companies, appeal by right from a December 30, 1998, judgment of the Court of Claims that granted summary disposition in favor of defendants. The appeals were consolidated. We affirm.

I

This case involves the effect of several federal laws, specifically 49 USC 11501, 49 USC 11506, and subsection 601(h) of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), PL 103-105, subsection 601(h), on various provisions of Michigan's Motor Carrier Act (MCA), MCL 475.1 *et seq.* This litigation began on January 3, 1995, when plaintiffs Westlake Transportation, Inc., et al., filed their complaint, alleging that the state's $100 annual fees for interstate and intrastate motor carriers were unconstitutional because federal laws, 49 USC 11506 and 49 USC 11501, respectively, preempted the state laws. On January 9, 1995, Troy Cab, Inc., et al., filed their complaint, and made similar allegations.

In Michigan, since 1933, motor-carrier regulation has been pursuant to the Michigan MCA. The act authorizes the Michigan Public Service Commission (PSC) to enforce the act. MCL 475.1(c); MCL 475.2. Under the MCA, motor carriers must pay a fee of $100 for each application filed with the commission for a certificate of authority or for a permit to operate intrastate. MCL 478.1. Also, motor carriers are required to pay an annual fee of $100 a vehicle

for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor-carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor-carrier vehicles licensed in Michigan that engage entirely in interstate commerce.[1] The act also provides that motor carriers that are registered outside Michigan are required to pay a registration fee of $10 a vehicle. MCL 478.7.

In February 1995, intervening plaintiffs filed their complaint, alleging that the intrastate-decal fee violated the Commerce Clause, US Const, art I, § 8, cl 3, and were subsequently granted the right to intervene. Plaintiffs Westlake Transportation, Inc., et al., and intervening plaintiffs both amended their complaints, adopting the other's substantive claims. The plaintiffs' cases were consolidated in April 1995 and the classes were certified in June 1995.

On June 22, 1995, plaintiffs filed two separate motions for partial summary disposition pursuant to MCR 2.116(C)(10): one regarding their intrastate-preemption claim and the other regarding their interstate-preemption claim. On June 30, 1995, intervening plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(10), regarding their claim alleging violation of the Commerce Clause. On October 27, 1995, defendants renewed their own motion for summary disposition. The Court of Claims issued its opinion on October 13, 1998,

[1] The fees in MCL 478.1 and 478.2(1) will be referred to as the "intrastate fees," and the fee in MCL 478.2(2) will be referred to as the "interstate fee."

concluding that plaintiffs' and intervening plaintiffs' claims were meritless, and denied their motions for partial summary disposition in an order entered on November 12, 1998. Subsequently, the court granted defendants' motion for summary disposition "for the reasons defendants stated in their November 10, 1998 supplemental brief," which relied on the court's October 13, 1998, opinion.

The court concluded that § 601 of the FAAAA did not preempt MCL 478.2(1) because the federal law did not preempt safety-related regulatory fees. The court also found that MCL 478.2(2) was not preempted because the federal law imposed the $10 maximum only on "participating states," not "registration states." The court further determined that MCL 478.2(1) did not implicate the Commerce Clause because it did not burden foreign motor carriers more heavily as compared to Michigan motor carriers engaged in interstate commerce, since the state statute only affects Michigan motor carriers who engage solely in intrastate commerce. Plaintiffs filed a motion for reconsideration, which was denied. Plaintiffs and intervening plaintiffs now appeal by right.

II

Summary disposition of all or part of a claim or defense may be granted when

> [e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. [MCR 2.116(C)(10).]

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim, and is reviewed de novo on appeal. *Spiek v Dep't of*

Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v Berkley,* 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b), *Meyer v Center Line,* 242 Mich App 560, 574; 619 NW2d 182 (2000). All reasonable inferences are to be drawn in favor of the nonmovant. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 618; 537 NW2d 185 (1995).

III

Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC 11506.[2] Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Konynenbelt v Flagstar Bank, FSB,* 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co, Inc v Coyne,* 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).

The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art VI, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & E R Co, Inc,* 237 Mich App 662, 665; 604 NW2d 702 (1999).

[2] This statute is currently codified as 49 USC 14504; however, we will refer to the law as § 11506.

Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law, (5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.*

49 USC 11506 provided, in part:

> (b) General rule. – The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.
>
> (c) Single State registration system. –
>
> (1) In general. – The Secretary shall maintain standards for implementing a system under which –
>
> (A) a motor carrier is required to register annually with only one State by providing evidence of its Federal registration under chapter 139;

(B) the State of registration shall fully comply with standards prescribed under this section; and

(C) such single State registration shall be deemed to satisfy the registration requirements of all other States.

(2) Specific requirements. –

(A) Evidence of Federal registration; proof of insurance; payment of fees. – Under the standards of the Secretary implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier registered by the Secretary under this part –

(i) to file and maintain evidence of such Federal registration;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) Receipts; fee system. – The standards of the Secretary –

(i) shall require that the registration State issue a receipt, in a form prescribed under the

standards, reflecting that the carrier has filed proof of insurance as provided under subparagraph (A)(ii) of this paragraph and has paid fee amounts in accordance with the fee system established under clause (iv) of this subparagraph;

(ii) shall require that copies of the receipt issued under clause (i) of this subparagraph be kept in each of the carrier's commercial motor vehicles;

(iii) shall not require decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier;

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that –

(I) is based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates;

(II) minimizes the costs of complying with the registration system; and

(III) results in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and

(v) shall not authorize the charging or collection of any fee for filing and maintaining evidence of Federal registration under subparagraph (A)(i) of this paragraph.

(C) Prohibited fees. – The charging or collection of any fee under this section that is not in accordance with the fee system established under

> subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce.

The MCA applies to entities engaged in interstate commerce only to the extent it is consistent with federal law. MCL 476.12. MCL 478.2(2) provides, in pertinent part, "A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[3]

Plaintiffs contend that the interstate fee was preempted both before and after the implementation of the Single State Registration System (SSRS) on January 1, 1994. With the implementation of the SSRS, § 11506 was amended and significant language changes were made. We will first address plaintiffs' preemption argument regarding § 11506 after January 1, 1994. However, before we do so, an understanding of the evolution of this federal law is helpful. The United States Supreme Court has summarized this evolution in *Yellow Transportation, Inc v Michigan*, 537 US ___, ___; 123 S Ct 371, 374-375; 154 L Ed 2d 377, 383-384 (2002):

> Beginning in 1965, Congress authorized States to require interstate motor carriers operating within their borders to register with the State proof of their Interstate Commerce Commission (ICC) interstate operating permits. Pub L 89-170, 79 Stat 648, 49 USC § 302(b)(2) (1970 ed). Congress provided that state registration requirements

[3] The subsection also provides that the fee is only $50 if the motor carrier begins operations after June 30th of the year. The other provisions in the subsection are not at issue in this appeal.

> would not constitute an undue burden on interstate commerce so long as they were consistent with regulations promulgated by the ICC. *Ibid.*

Prior to 1994, the ICC allowed States to charge interstate motor carriers annual registration fees of up to $10 per vehicle. See 49 CFR § 1023.33 (1992). As proof of registration, participating States would issue a stamp for each of the carrier's vehicles. § 1023.32. The stamp was affixed on a "uniform identification cab car[d]" carried in each vehicle, within the square bearing the name of the issuing State. § 1023.32(d)-(e). This system came to be known as the "bingo card" system. *Single-State Insurance Registration*, 9 ICC2d 610, 610 (1993).

The "bingo card" regime proved unsatisfactory to many who felt that the administrative burdens it placed on carriers and participating States outweighed the benefits to those States and to the public. HR Rep No 102-171, pt I, p 49 (1991), HR Conf Rep No 102-404, pp 437-438 (1991), US Code Cong & Admin News 1991, pp 1526, 1679. In the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress therefore directed the ICC to implement a new system to replace the "bingo card" regime.* See Pub L 102-240, § 4005, 105 Stat 1914, 49 USC § 11506(c) (1994 ed). Under the new system, called the Single State Registration System, "a motor carrier [would be] required to register annually with only one State," and "such single State registration [would] be deemed to satisfy the registration requirements of all other States." §§ 11506(c)(1)(A) and (C). Thus, one State would – on behalf of all other participating States – register a carrier's vehicles, file and maintain paperwork, and collect and distribute

registration fees. § 11506(c)(2)(A). Participation in the Single State Registration System was limited to those States that had elected to participate in the "bingo card" system. § 11506(c)(2)(D).

ISTEA also capped the per-vehicle registration fee that participating States could charge interstate motor carriers. Congress directed the ICC to "establish a fee system . . . that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." § 11506(c)(2)(B)(iv). Congress provided that the charging or collection of any fee not in accordance with the ICC's fee system would "be deemed to be a burden on interstate commerce." § 11506(c)(2)(C).

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*Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The provisions of ISTEA governing the system were amended and recodified. See 49 USC § 14504(c). The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC § 113(f)(1).

A

Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state,[4] and asserts that motor carriers registered in Michigan are required to be charged similarly.

Defendants' counterargument is two-fold. First, § 11506 applies to registration fees only, not regulatory fees, and the interstate fee at issue is a regulatory fee. Second, the fee limit in § 11506 applies to participating states only, not the registration state. The court agreed with defendants' argument and granted summary disposition on this issue for the same reasons. Therefore, the key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations that interpret it.

It is not an unreasonable burden on interstate commerce to require vehicles to register with a state; however,

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[4] MCL 478.7 provides, in part:

> (4) The annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in another state or province of Canada shall be $10.00. The commission may enter into a reciprocal agreement with a state or province of Canada that does not charge vehicles licensed in this state economic regulatory fees or taxes and may waive the fee required under this subsection.

any registration requirements of a state that are in excess of the standards in subsection 11506(c) are considered an unreasonable burden. Subsection 11506(b). Under the SSRS, a motor carrier is required to register annually with only one state, and that registration satisfies the registration requirements of all the states. Subsection 11506(c)(1)(A). A motor carrier may only register with a participating state, a state which participated in the old "bingo card" system. Subsection 11506(c)(2)(D). The motor carrier must register with the state where its principal place of business is located, if it is a participating state, or else register with the participating state in which it operates the most vehicles. 49 CFR 367.3.[5] Therefore, a registration state, the state in which a motor carrier registers, is by definition a participating state. Michigan is a participating state, *Yellow Transportation, supra*, 123 S Ct 376; 154 L Ed 2d 385, and therefore, can be a registration state.

The registration state may require a motor carrier to (1) file proof of its federal registration (ICC permit), (2) file proof of insurance, (3) file the name of its agent for service of process, and (4) pay a fee. Subsection 11506(c)(2)(A). The registration state is then to issue the motor carrier a receipt, reflecting that proof of insurance was filed and that the fee was paid, a copy of which is to be kept in the carrier's vehicles. Subsection 11506(c)(2)(B). The fee is for the filing of the proof of insurance, and may not be charged for the filing of the motor carrier's ICC permit. Subsections 11506(c)(2)(B)(iv) and (v).

[5] 49 CFR 1023.1 *et seq.*, was recodified as 49 CFR 367.1 *et seq.*

In support of the registration fee, the motor carrier must file with the registration state a form that delineates (1) the number of vehicles it intends to operate in each participating state, (2) the fee each participating state charges each vehicle, (3) the total fee due each participating state, and (4) the total of all the fees due. 49 CFR 367.4(c)(4). The fee each participating state is allowed to charge each vehicle is equal to the amount the state charged or collected as of November 15, 1991, not to exceed $10. Subsection 11506(c)(2)(B)(iv)(III); 49 CFR 367.4(c)(4)(ii). Congress wanted to "minimize[ ] the costs of complying with the registration system" for the motor carriers, subsection 11506(c)(2)(B)(iv)(II), while at the same time preserving "revenues for the states which had participated in the bingo program," HR Conf Rep No 102-404 reprinted in 1991 USCCAN 1817. The fees a registration state collects on behalf of other participating states are remitted to those states monthly. 49 CFR 367.6. Thus, if a motor carrier registered in Michigan, it would first list the number of vehicles it operated in each participating state. Because Michigan is a participating state, it would need to list the number of vehicles it operated in Michigan. The fee Michigan could charge cannot exceed $10.

We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.

The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, so that it is subject to the limitation in § 11506, or whether it is a regulatory fee. Plaintiffs assert that the fee is for all practical purposes a registration fee. Because the fee must be paid at the time a motor carrier registers with a state, and in return for the fee receives an identification decal, plaintiffs contend that one can only conclude that the fee is, in actuality, a registration fee. We disagree. Faced with a similar situation in *Franks & Son, Inc v Washington*, 136 Wash 2d 737, 759-760; 966 P2d 1232 (1998), the Washington Supreme Court rejected the plaintiffs' argument that because the regulatory fee and federal identification fee were collected at the same time, an unlawful registration requirement resulted. The court adeptly stated, "We believe a more realistic rationale for concurrent collection of the two fees was administrative convenience and efficiency." *Id.* at 760.

We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations.[6] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in

[6] Because vehicles licensed in Michigan that operate solely interstate are required to pay the $100 regulatory fee, the PSC waives the registration fee. *Schneider Nat'l Carriers, Inc v Michigan (On Remand)*, 247 Mich App 716, 721; 637 NW2d 838 (2001). Hence, the registration fee Michigan charges for vehicles licensed in Michigan is $0, less than the $10 limit imposed by § 11506. Therefore, the registration fee is within the federal mandate.

MCL 478.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Plaintiffs argue that the federal law prohibits construing the fee as a regulatory fee, citing *Roadway Express, Inc v Treasurer of State of Illinois*, 120 Ill App 3d 133; 458 NE2d 66 (1983). That case involved a $31 registration fee Illinois charged Ohio motor carriers. *Id.* at 133-134. At the time, the federal regulation allowed a maximum registration fee of $5 plus an additional reasonable fee imposed to defray the cost of the regulation of carriers within the state's borders. *Id.* at 135. Plaintiffs contend that *Roadway Express* "issued a warning" that "no such additional 'regulatory fee' was permissible after 1981" because the federal regulation interpreting § 11506 was amended in 1981 and set an absolute limit of $10 for identification fees. However, *Roadway Express* issued no such warning. The court merely noted, "again parenthetically," that the federal regulation, 49 CFR 1023.33 (redesignated), was amended and set the limit at $10. *Roadway Express, supra* at 135.

Plaintiffs appear to argue that because the amended federal regulation did not explicitly provide for an additional fee, one was hence prohibited. However, plaintiffs provide no support for their argument. Further, plaintiffs fail to recognize the import of two other regulations in existence at the time. 49 CFR 1023.105 (1991) (superseded) provided that the rules and regulations were not to be construed to affect the collection of taxes or fees by a state from motor carriers for the operation of vehicles within the borders of a state. 49 CFR 1023.104 (1991) (superseded) provided that states were "urged" to use fees collected for the purpose of defraying the cost of regulation of motor carriers within their borders. Therefore, the

ability of a state to collect fees in addition to the registration fees was not affected by the removal from § 1023.33 of the language providing for additional fees.[7]

B

Plaintiffs also argue that the interstate fee was prohibited before the creation of the SSRS in 1994, under the previous version of § 11506. Plaintiffs assert this argument because their complaint was filed in the beginning of 1995, and with a three-year period of limitation, plaintiffs contend that they are entitled to a refund for the excess fees they have paid since 1992.

Before the 1994 enactment of the SSRS, § 11506 read, in pertinent part:

> (b) The requirement of a State that a motor carrier . . . register the certificate or permit issued to the carrier under section 10922 or 10923 of this title is not an unreasonable burden on transportation referred to in section 10521(a)(1) and (2) of this title when the registration is completed under standards of the Commission under

[7] We note that the substance of 49 CFR 1023.104 and 1023.105 was not included in the 1994 amendments, 49 CFR 1023.1-1023.6. However, neither was there any express prohibition on state-imposed regulatory fees. The statute and its regulations address registration requirements only. Because there is a presumption against federal preemption, we believe that Congress's silence cannot be interpreted as prohibiting state regulatory fees, see *Wisconsin Pub Intervenor v Mortier*, 501 US 597, 607; 111 S Ct 2476; 115 L Ed 2d 532 (1991), particularly given that regulatory and registration fees can coexist in the same field without conflicting, *Duprey, supra* at 665.

> subsection (c) of this section. When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden.
>
> (c)(1) The Commission shall maintain standards and amendments to standards (A) prepared and certified to it by the national organization of the State Commissions, and (B) prescribed by the Commission. . . .

The Commission prescribed the following interpretive regulation:

> The application for the issuance of such identification stamps or number shall . . . be duly completed and executed by an official of the motor carrier, and shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $10 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. [49 CFR 1023.33 (superseded).]

The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8]

[8] We note that the cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on

(Continued on following page)

Accordingly, the court did not err in granting defendants summary disposition.

IV

In their complaints, plaintiffs and intervening plaintiffs allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) were preempted by § 601 of the FAAAA. Subsection 601(h), which became effective on January 1, 1995, prohibited state regulation of prices, routes, or services of motor carriers, save for a few delineated exceptions. (Currently codified as 49 USC 14501[c].)

Plaintiffs argue that the court erred in granting defendants summary disposition on this issue before discovery was complete.[9] Plaintiffs assert that they should have been allowed an opportunity to conduct additional discovery in order to show that, as utilized, the intrastate fees are prohibited by federal law.

In re Fed Preemption of Provisions of the Motor Carrier Act, 223 Mich App 288, 302; 566 NW2d 299 (1997), held that § 601 did not preempt the entire MCA and did not indicate an intent to preempt fee provisions such as MCL 478.1 and MCL 478.2. The Court noted that in response to the enactment of the FAAAA, the PSC "issued considered decisions that indicated how its regulation of the trucking industry in Michigan was affected by federal

whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

[9] We note that plaintiffs do not contest the court's summary-disposition ruling, that § 601 did not preempt the intrastate fees.

legislation preempting at least some aspects of state regulation." *In re Motor Carrier Act, supra* at 300. In regard to the fee provisions at issue, the Court stated:

> The PSC still has significant regulatory obligations. For example, the PSC must supervise and regulate the safety of motor carrier operations. MCL 479.41; MSA 22.587(1). There is still a certification process. It follows that the fees for obtaining a certificate of authority, MCL 478.1; MSA 22.560, for protesting an application for a certificate, MCL 478.1a; MSA 22.560(1), and for administering the act, MCL 478.2(1); MSA 22.561(1), are unaffected by the preemptive effect of § 601. In fact, *because the PSC is not using its resources to enforce preempted portions of the Motor Carrier Act, the fees collected by the PSC are not related to the preempted provisions and rules.* Indeed, appellants Central Transport and Universal Am-Can have not shown that the cost of the PSC's operations has ever been totally funded by the fees it collects, and they have not provided any reason to believe that the fees collected were or can be used only for what is now preempted economic regulation. [*Id.* at 302-303; emphasis added.]

Plaintiffs contend that the PSC intrastate fees were being used to fund preempted portions of the MCA, and, thus, the fees were related to a preempted provision. Therefore, the fees were also preempted. Plaintiffs did not submit any documentary evidence below in support of this contention. Plaintiffs argue that they had intended to do so, but their opportunity was foreclosed when the court denied their motion for partial stay and bifurcation of issues. Plaintiffs requested a 90- to 120-day stay in the proceedings to conduct discovery in order to present a

factual record to the court in a supplemental brief in response to the decision in *In re Motor Carrier Act, supra*; however, the court denied the motion without prejudice because it believed its summary-disposition ruling would cover the issue.

A court's decision regarding matters of discovery is reviewed on appeal for an abuse of discretion. *In re Pott*, 234 Mich App 369, 373; 593 NW2d 685 (1999). Plaintiffs could not address this Court's decision in *In re Motor Carrier Act, supra*, in their original motions for partial summary disposition because they were filed and argued in 1995, and the case was not decided until April 25, 1997. However, plaintiffs did not file their motion for partial stay and bifurcation of issues until March 1998, nearly one year later. The record indicates that plaintiffs were conducting discovery during this entire time, yet never sought evidence relating to this issue.

We find that plaintiffs had ample opportunity to conduct discovery following the decision in *In re Motor Carrier Act, supra*, and file a supplemental brief containing their findings. Given that one year had passed, we also find that there is no reason to believe that had plaintiffs been given another three or four months in which to conduct discovery, plaintiffs would have uncovered a factual basis for their claim. Furthermore, we note that by stipulation, discovery was to be completed 180 days after the court issued its ruling on the parties' motions for summary disposition.

Plaintiffs assert in their reply brief that they are not arguing that they were prevented from conducting discovery, but that they were denied an opportunity to supplement their motion papers. However, the court did not

foreclose plaintiffs' opportunity to present their argument. They could have filed additional briefs at any time before the court issued its ruling. In fact, on January 28, 1998, plaintiffs filed a supplemental brief in support of their motions for summary disposition and in opposition to defendants' motion, in which they specifically mentioned *In re Motor Carrier Act, supra*. This indicates plaintiffs were well aware of the import of the case, and could have conducted discovery and presented their argument accordingly. Plaintiffs mention that defendants did not submit the opinion as authority until January 1998. However, *In re Motor Carrier Act* was decided in April 1997, and nothing prevented plaintiffs from proactively distinguishing their case from it.

Moreover, the court specifically invited plaintiffs to present their argument again if they thought its ruling did not adequately cover the issue. Plaintiffs did file a motion for reconsideration after the court issued its orders on the parties' motions for summary disposition, yet did not reraise this issue. We recognize that plaintiffs renewed their motion to stay on October 8, 1998; however, this was before the court issued its ruling. Because the court had not yet issued its ruling, plaintiffs could have attempted to conduct discovery after its first motion was denied.

Therefore, we conclude that the court did not abuse its discretion in denying plaintiffs' request to stay the proceedings in order to conduct additional discovery. A decision of a court that obtained the correct result, albeit for a different reason, will be affirmed on appeal. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001).

V

Plaintiffs Troy Cab, Inc., et al., allege that the intrastate fees in MCL 478.1 and MCL 478.2(1) are unconstitutional taxes in violation of various sections of the Michigan Constitution. The fees at issue are credited to the PSC. MCL 478.6. Whether a charge is a permissible fee or an illegal tax is a question of law. *Bolt, supra* at 158. A court's factual findings are reviewed for clear error. A finding is clearly erroneous when, although there is evidence to support it, upon reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake was made. *Christiansen v Gerrish Twp,* 239 Mich App 380, 387; 608 NW2d 83 (2000).

In determining whether a charge imposed by a unit of government is a fee or a tax, a court must consider: (1) whether the charge serves a regulatory purpose rather than operates as a means of raising revenue; (2) whether the charge is proportionate to the necessary costs of the service to which it is related; and (3) whether the payor has the ability to refuse or limit its use of the service to which the charge is related. *Bolt, supra* at 161-162. These factors should be considered in their totality, and a weakness in one area does not mandate a particular finding. *Id.* at 167; *Graham v Kochville Twp,* 236 Mich App 141, 151; 599 NW2d 793 (1999).

Taxes have a primary purpose of raising revenue, while fees are usually in exchange for a service rendered or a benefit conferred. *Bolt, supra* at 162. The stated purpose of the intrastate fees is for "the administration of [the MCA]." MCL 478.1; MCL 478.2(1). The express purposes of the act are

to confer upon the [PSC] the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to: (a) Relieve all future undue burdens and congestion on the highways arising by reason of the use of the highways by motor vehicles operated by motor carriers; (b) protect and conserve the highways and protect the safety and welfare of the traveling and shipping public in their use of the highways; (c) promote competitive and efficient transportation services; (d) meet the needs of motor carriers, shippers, receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; (h) promote intermodal transportation; (i) prevent unjust discrimination; (j) promote greater participation by minorities in the motor carrier system; (k) provide and maintain service to small communities and small shippers; (l) prevent evasion of this act through any device or arrangement; (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; and (n) promote the use of jointly considered and initiated rates, classifications, divisions, allowances,

charges, or rules of motor carriers under commission approved agreements. [MCL 475.2.[10]]

This language indicates the exactions are regulatory.

Taxes are designed to raise revenue for the general public, while a fee "confers benefits only upon the particular people who pay the fee, not the general public or even a portion of the public who do not pay the fee." *Graham, supra* at 151. In this case, in exchange for the fees, a motor carrier receives the right to operate its trucks in Michigan, and the fees are used to enforce the provisions of the act that carry out the above-listed purposes. Thus, there is a direct benefit to the one who pays the fees. We recognize that promoting and regulating safe use of the highways benefits the general public as well. However, a regulatory fee can have dual purposes and still maintain its regulatory characterization. As long as the primary purpose of a fee is regulatory in nature, the fee can also raise money provided that it is in support of the underlying regulatory purpose, *id.* at 151, and thus benefit the general public.

Plaintiffs' argument focuses on the second prong of the test, whether the fees are proportional to the cost of the services to which they relate. Plaintiffs assert that in 1982, when the fees were increased,[11] they became taxes because the amounts collected were in excess of the

[10] Any purposes that related to economic regulation were preempted by § 601 of the FAAAA as of January 1, 1995, and the PSC ceased to enforce those regulations. *In re Motor Carrier Act, supra* at 300. However, the Legislature has yet to amend the MCA to reflect the federal preemption.

[11] 1982 PA 399 raised the fees in MCL 478.1 and MCL 478.2(1) to their current levels.

expenses related to the services. A fee must be proportionate to the cost of the regulation, but its amount is presumed reasonable unless its unreasonableness is established. *Id.* at 151. "[W]here revenue generated by a regulatory 'fee' exceeds the cost of regulation, the 'fee' is actually a tax in disguise." *Gorney v Madison Hgts,* 211 Mich App 265, 268; 535 NW2d 263 (1995).

In support of their contention, plaintiffs presented two affidavits and a senate fiscal report. We find the affidavits of minimal value in determining whether the fees are unreasonable. Neither of the affiants worked for the PSC and they could only offer their opinion regarding how the fees were spent. The senate fiscal report, created by a senate fiscal analyst, showed how the funds received by the PSC were utilized for fiscal years 1982-83 to 1994-95,[12] and one of the charts showed that there was a surplus nearly every year.[13]

[12] Plaintiffs also assert that the report shows that the fees supported activities not related to the regulation of motor carriers because a portion was allocated to the State Police, Department of Commerce, and Department of Civil Service. However, it is the duty of the police to assist the PSC in enforcement of the MCA, MCL 479.13, and the Department of Commerce provides administrative support to the PSC that enables it to carry out its duties. It follows that the PSC would allocate a portion of the fees to them. In addition, the allocation of a very small portion of the PSC's revenues to the Department of Civil Service is mandated by the Legislature in accordance with the constitution to fund the civil service. Const 1963, art 11, § 5. The allocations to this department averaged only $23,000 each year when revenues ranged from $3.2 to $6.3 million.

[13] Plaintiffs present no evidence regarding the proportionality of the fees after 1995, when the PSC ceased any economic regulatory functions as mandated by § 601 of the FAAAA. Therefore, we have no basis on which to determine the proportionality of the fees after 1995.

However, defendants dispute the accuracy of the figures in the report. Defendants note that charts reflect the total fees collected, not just the fees collected pursuant to MCL 478.1 and MCL 478.2(1), and defendants got confirmation from the author of the report that appropriations to the Michigan Truck Safety Fund were not considered. Therefore, defendants contend that the excess amounts were distorted.

It is clear that the report on which plaintiffs rely included all fee revenues without excluding nonchallenged interstate fees collected pursuant to the SSRS and its predecessor system. Therefore, the surplus figures were distorted to some degree. Even without reducing the surplus figures, the aggregate excess during the thirteen years was only 11.7 percent, a relatively small percentage. The test is whether the fee is proportional, not whether it is equal, to the amount required to support the services it regulates. *Graham, supra* at 151. We conclude that the Court of Claims did not clearly err in finding that the fees were not "wholly disproportionate."

Lastly, plaintiffs argue that the exaction is not voluntary because a motor carrier cannot operate its trucks in Michigan without paying it. Defendants argue that a motor carrier has a choice with regard to what extent its trucks will have a presence in Michigan, and, therefore, the exaction is voluntary. While this is true in regard to the application fee, MCL 478.1, defendants' logic is erroneous in regard to the administration fee, MCL 478.2(1), because every vehicle licensed in Michigan must pay this fee irrespective of where it operates. Even if we were to view the exaction as more compulsory than voluntary, when the totality of factors are considered, we believe the exactions are most properly classified as regulatory fees.

Bolt, supra at 167; *Graham, supra* at 151. Therefore, the court did not err in granting defendants summary disposition on this issue.

VI

Plaintiffs next argue that the intrastate and interstate fees violate the Equal Protection Clause of the United States and Michigan Constitutions because they apply to "for-hire" motor carriers only and not to private motor carriers.[14] Both the federal and state constitutions guarantee equal protection, and afford similar protection. Const 1963, art 1, § 2; US Const, Am XIV, § 1; *Vargo v Sauer,* 457 Mich 49, 60; 576 NW2d 656 (1998). A court's ruling whether a statute violates equal protection is a question of law. *McDougall v Schanz,* 461 Mich 15, 24; 597 NW2d 148 (1999).

Legislative classifications that do not implicate a fundamental right or target a suspect class are presumed to be constitutional if they have a rational basis, and one who challenges such a statute has the burden of showing that it bears no rational relation to some independent and legitimate legislative end. *TIG Ins Co, Inc v Dep't of Treasury,* 464 Mich 548, 557; 629 NW2d 402 (2001); *Vargo, supra* at 60. Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or works to the disadvantage of a particular

[14] Because we concluded that the fees are regulatory, plaintiffs additional argument, that the fees violate Michigan's Uniform Taxation Clause, is without merit.

group, or if the rationale seems to be tenuous. *People v Copper (After Remand)*, 220 Mich App 368, 372-373; 559 NW2d 90 (1996). A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it. *Id.* at 373.

Before 1994, the fees were used to fund the economic- and safety-regulation of motor carriers. Motor carriers do not include private carriers. MCL 475.1(i). A private carrier is "any person engaged in the transportation of property by motor vehicle upon public highways where the transportation is incidental to, or in furtherance of, any commercial enterprise of the person, other than transportation." MCL 475.1(q). A "for hire" motor carrier is one that receives "remuneration or reward of any kind, paid or promised, either directly or indirectly." MCL 475.1(e). Thus, "for hire" motor carriers are engaged in the business of transportation.

The rationale behind the classification distinction may be supported by facts either known or reasonably assumed, even if those facts may be debatable. *TIG Ins, supra* at 557, citing *Crego v Coleman*, 463 Mich 248, 259-260; 615 NW2d 218 (2000). We believe it is reasonable to assume that motor carriers have larger fleets than private carriers, operate under competitive pressures, and operate more frequently than private carriers. We can surmise that these carriers are in need of being more closely scrutinized in order to protect the general public, which also uses the public highways; thus, the need for regulations and fees to cover their enforcement.

Even after economic regulation of the motor carriers ceased, as *In re Motor Carrier Act, supra* at 302, recognized, the PSC "still has significant regulatory obligations,"

including supervising and regulating the safety of motor-carrier operations, as well as the certification process. Therefore, the need for fees to support such regulations were not eliminated after the FAAAA was enacted. The same concerns that existed before still existed. Accordingly, we conclude that the Legislature's classification bore a rational relation to a legitimate state purpose, and the court did not err in granting defendants summary disposition.

VII

Finally, intervening plaintiffs argue that the intrastate fee imposed by MCL 478.2(1) violates the Commerce Clause because it burdens interstate commerce. Again, we disagree, but for a different reason than stated by the Court of Claims.

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states. . . ." US Const, art I, § 8, cl 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon*, 511 US 93, 98; 114 S Ct 1345; 128 L Ed 2d 13 (1994).

The Court of Claims held that the Commerce Clause was not implicated because the fee applied to intrastate carriers only. However, any tax or regulation that affects interstate travel, even if imposed solely on intrastate commerce, is subject to Commerce Clause analysis. *Citizens for Logical Alternatives & Responsible Environment v Clare Co Bd of Comm'rs*, 211 Mich App 494, 499; 536 NW2d 286 (1995). Because the fee is imposed on any

vehicle that operates intrastate pursuant to a certificate of authority, even if it also travels interstate, the fee affects interstate commerce, and thus, implicates the dormant Commerce Clause. Although the Court of Claims did not address this issue, our review is nevertheless proper because whether a statute violates the Commerce Clause is a question of law. *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

"A statute is presumed constitutional absent a clear showing to the contrary." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). The test for determining whether a regulatory fee violates the Commerce Clause involves a two-tiered approach.[15] The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce. *Oregon Waste, supra* at 99. "'[D]iscrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The United States Supreme Court has recognized that there is no clear line separating the two categories. The critical consideration is the overall effect of the statute on both local and interstate activity. *Brown-Forman Distillers Corp v New York State Liquor Auth*, 476

[15] Intervening plaintiffs contend that the four-pronged test enunciated in *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and utilized in *American Trucking Ass'ns, Inc v Scheiner*, 483 US 266, 283; 107 S Ct 2829; 97 L Ed 2d 226 (1987), is applicable. However, this test is used to analyze the constitutionality of state-taxation statutes that tax interstate commerce itself, i.e., taxes for the privilege of doing business in the state, *Complete Auto, supra* at 279, not regulatory statutes.

US 573, 579; 106 S Ct 2080; 90 L Ed 2d 552 (1986). A state law will be invalidated if it "discriminate[s] against an article of commerce by reason of its origin or destination out of State." *C & A Carbone, Inc v Town of Clarkstown, New York*, 511 US 383, 390; 114 S Ct 1677; 128 L Ed 2d 399 (1994).

In making this determination, we must consider all the provisions of the challenged statute. MCL 478.2(1) requires that motor carriers that are licensed in Michigan and travel solely intrastate or travel both intrastate and interstate, a "mixed" carrier, must pay a fee of $100 for each vehicle. MCL 478.2(2) requires that motor carriers that are licensed in Michigan and travel solely interstate must also pay the $100 fee. Therefore, the regulatory fee is the same for all motor carriers licensed in Michigan, regardless of their final destination. It does not directly regulate interstate commerce, *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), nor is economic protectionism at issue, *Arkansas Electric Coop Corp v Arkansas Pub Service Comm*, 461 US 375, 394; 103 S Ct 1905; 76 L Ed 2d 1 (1983).

Defendants assert that the majority of vehicles that pay the fee operate solely intrastate, which presumably leads to their conclusion that the effect on interstate commerce is minimal. However, the number of interstate vehicles burdened is inconsequential to a finding of discrimination. *New Energy Co of Indiana v Limbach*, 486 US 269, 276-277; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

Intervening plaintiffs argue that the mixed carrier invariably will pay a higher per-mile fee than the carrier who operates solely intrastate. They assert that because the fee is a flat annual fee, in order to receive the greatest

benefit for the fee, a carrier would need to maximize its intrastate operations and this could potentially affect a carrier's economic decisions by discouraging an intrastate carrier from engaging in interstate commerce.

While this may be so, it is a matter of pure speculation. Intervening plaintiffs present no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical. Only one affidavit was submitted by intervening plaintiffs, in which James Crozier, manager of licensing and fuel for intervening plaintiff TNT Holland Motor Express, Inc., stated that mixed carriers often top off their interstate loads with intrastate hauls or transport intrastate loads in between interstate hauls. However, he never averred that this was done only because of the fee imposed by MCL 478.2(1). Regardless of the $100 fee, topping off loads or adding intrastate hauls in between interstate ones is an economically efficient decision for the motor carriers. We do not find that the fee raises a significant barrier to participation in interstate trade. Any effect the fee has on interstate commerce is incidental and does not rise to the level of discrimination.

Having concluded that the statute regulates evenhandedly, it will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike, supra* at 142. Intervening plaintiffs do not contest that the statute serves a legitimate nondiscriminatory purpose, i.e., funding safety and related regulations. This is an exercise of the state's police power and serves a critical function in protecting the people who use Michigan's highways. Great deference is given to state legislation in the field of highway safety regulation and a strong presumption in favor of its validity

exists. *Raymond Motor Transportation, Inc v Rice,* 434 US 429, 443; 98 S Ct 787; 54 L Ed 2d 664 (1978). On the basis of the record before us, we cannot say that the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways. Therefore, we hold that MCL 478.2(1) does not violate the Commerce Clause. Accordingly, we affirm the Court of Claims' summary-disposition ruling in favor of defendants even though it reached its decision for the wrong reason. *Lavey, supra* at 250.

Affirmed.

/s/ Michael R. Smolenski
/s/ Jane E. Markey
/s/ Henry William Saad

(14) (8)

Nos. 03-1230 and 03-1234

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.
AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF FOR PETITIONERS MID-CON FREIGHT SYSTEMS, INC., *et al.* No. 03-1234

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QUESTION PRESENTED

For nearly forty years, Congress has imposed express limitations on State registration of interstate motor carriers and their vehicles. In 1991, Congress directed the Interstate Commerce Commission ("ICC") to implement a new uniform program called the Single State Registration System ("SSRS") under which each interstate motor carrier registers annually with just one State, and each State may only charge a per-truck fee "equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. § 14504(c)(2)(B)(iv)(III). Congress also found that "[t]he charging or collection of any fee under this section that is not in accordance with th[is] fee system . . . shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C).

Michigan is a member of the SSRS and requires all interstate carriers to register annually with the Michigan Public Service Commission ("PSC") before operating on Michigan highways. However, if an interstate carrier uses trucks with license plates purchased from the Michigan Secretary of State, the PSC waives the normal $10 fee and substitutes in its stead a $100 decal fee for each truck registered each year. Notwithstanding the $10 fee cap of 49 U.S.C. § 14504(c)(2)(B)(iv)(III), the Michigan Court of Appeals upheld Michigan's $100 fee based on the notion that so-called "regulatory fees" are not preempted by the SSRS.

Against that backdrop, this Court has posed the following question: Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. § 14504.

RULE 24.1(b) STATEMENT

Parties to the proceedings below were as follows: (a) As plaintiffs, Mid-Con Freight Systems, Inc.; Lafond Express, Inc. f/k/a Elex, Inc.;[1] Westlake Transportation, Inc.; Gerig's Trucking & Leasing, Inc.; Bestway Express, Inc.; Van Der Kooi Carriers, Inc.; Prism, Inc.; El Toro, Inc.; Myriah, Inc.; Troy Cab, Inc.; Deeco Services, Inc. d/b/a Deeco Transportation; Frank Tiberio d/b/a Fairfield Towing; Dale Constine & Sons, Inc.; Calcut Sales & Services, Inc. d/b/a Calcut Trucking Company; Ambassador Transportation, Inc.; Hawkins Steel Cartage, Inc.; JLH Transfer, Inc.; H&H Enterprises, Inc. d/b/a S&M Cartage; Central Transport, Inc.; Bancroft Trucking Co.; U.S. Truck Co., Inc.; West End Cartage, Inc.; Central Cartage Co.; CTX, Inc.; Mohawk Motor of Michigan, Inc.; Economy Transport, Inc.; McKinlay Transport, Inc. Ltd.; Mason & Dixon Lines, Inc.; Universal Am-Can, Ltd.; Romeo Expeditors, Inc.; Tom Thumb Services, Inc. d/b/a Rei; O-Jay Transport Company; J. Law Enterprises, Inc.; and Alliance of O-Jay Transport, Inc.; (b) as intervening plaintiffs, American Trucking Associations, Inc. and TNT Holland Motor Express, Inc.; and (c) as defendants, the Michigan Public Service Commission; the Michigan Department of Treasury; the Michigan Department of Commerce; the State of Michigan; the Commissioners and Chairman of the Michigan Public Service Commission; the Treasurer of the State of Michigan; and the Director of the Michigan Department of Commerce.

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[1] Prior to changing its corporate name, Lafond Express, Inc. appeared as "Elex, Inc." in the proceedings below.

RULE 29.6 STATEMENT

Petitioners, Mid-Con Freight Systems, Inc. and Lafond Express, Inc., have no parent companies and are not owned in any respect by any publicly-held entity.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals (J.A. 68-102) is reported as *Westlake Transportation, Inc. v. Michigan Public Service Comm'n*, 255 Mich.App. 589, 662 N.W.2d 784 (2003). The trial court rulings and the judgment of the Michigan Supreme Court denying leave to appeal are all unreported and are set forth in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 36-75.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' timely application for leave to appeal was entered December 3, 2003. A petition for certiorari was filed February 26, 2004 and granted on January 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Supremacy and Commerce Clauses of the United States Constitution, Art. VI, cl. 2 and Art. I, § 8, cl. 3, provide in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

> The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . .

The pertinent statutory provisions are reproduced at Pet. App. 76-88. The statute involved is 49 U.S.C. § 14504 ("Section 14504").

STATEMENT OF THE CASE

The decision below undermines the federal regulatory plan of the SSRS and slights Congress's plenary authority to regulate interstate commerce. In designing the SSRS, Congress expressly limited the per-truck fees State regulatory commissions may levy against interstate motor carriers and declared fees in excess of $10 per truck to be a burden upon interstate commerce. Nevertheless, the court below held that Michigan's PSC may exceed the federal fee cap by tenfold and evade preemption by calling its levy a "regulatory fee." That decision cannot be squared with the plain language of Section 14504 and is irreconcilable with Congress's preemptive purpose. The Michigan Court of Appeals ruling, therefore, should be reversed.

A. Federal Regulatory Background

As discussed in *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002), the 1991 enactment of the Intermodal Surface Transportation Efficiency Act ("ISTEA")[2] amended longstanding federal law to create a new system known as the SSRS under which State regulatory agencies

[2] Pub. L. No. 102-240, 105 Stat. 1914 (1991).

are permitted to register interstate motor carriers operating within their borders. As it concerns the fees that may be charged in connection with such limited State regulation of interstate trucking, however, the SSRS is little different from its statutory predecessor. Controlling federal law has long preempted per-vehicle fees in excess of $10.

In 1965, Congress first directed the ICC to implement standards under which States could require motor carriers to prove the lawfulness of their interstate operations. Congress's purpose was to protect legitimate carriers from the "not only illegal but also manifestly unfair" competition of unauthorized truckers and to establish "uniformity of registration" because "registration requirements differ[ed] widely among the States" and could "impose undue burdens on carriers." H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2924-2925, 2929. The proposed Congressional registration standards permitted the States to (1) require evidence of the carriers' ICC operating authority; (2) compel the filing of proof of insurance; (3) demand the designation of service of process agents; and (4) register and identify motor vehicles operating under the carriers' authority. *Id.* at 2928. It was contemplated that the new standards would go into effect five years after their promulgation, and, "thereafter, State requirements in excess of those promulgated would constitute an undue burden on interstate commerce." *Id. See also* 49 U.S.C. § 302(b) (1970 ed.). By the time of the 1978 recodification of the Interstate Commerce Act, Congress had plainly stated the preemptive effect of the standards as follows:

> When a State registration requirement imposes obligations in excess of the standards, the part in

excess is an unreasonable burden [on interstate transportation].

49 U.S.C. § 11506(b) (1988 ed.).[3]

The standards the ICC implemented, in accordance with Congress's directive, permitted State regulatory commissions to register and identify interstate motor carrier vehicles for a fee assessed on a per-vehicle basis. As proof of registration and identification, each State participating in the program issued what were known as "bingo stamps" for each vehicle, and the stamps were placed on vehicle-specific "bingo cards." *See Yellow Transportation*, 537 U.S. at 39; *National Ass'n of Regulatory Utility Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 724 (D.C. Cir. 1994). During all years relevant to this case, the applicable ICC regulation always imposed a fee cap of $10 for each vehicle registered and each identification stamp issued. *See* 49 C.F.R. § 1023.33 (1991). Indeed, an historical review of the regulation from 1982 forward reveals that it remained unchanged until 1992 when the ICC began rulemaking proceedings to implement the SSRS.

In 1991, when Congress enacted the ISTEA, it also made broad changes to national transportation funding and regulation. Among the changes made was standardization of the International Registration Plan ("IRP"), a previously voluntary program by which an interstate

[3] Prior to the 1978 recodification, the statement read "[t]o the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce." 49 U.S.C. § 302(b) (1970 ed.).

carrier purchases license plates for its vehicles from a single "base" State that collects, distributes, and apportions the other States' plating fees based on the carrier's mileage traveled in each State.[4] The ISTEA also dismantled the "bingo card" system and directed the ICC to streamline State registration of interstate carriers through implementation of the SSRS.

Like the "bingo card" system, the SSRS permits the registration of interstate operating authority, the filing of proof of insurance, and the designation of local agents. Under the SSRS, however, each interstate motor carrier is now required to register annually with only a "base" State – usually the State in which the carrier's principal place of business is located.[5] The "base" State then collects and distributes fees for all other States participating in the program through which the carrier operates. Further, the SSRS eliminated the "bingo stamp" system of registering and identifying vehicles and "capped the per-vehicle registration fee that participating States could charge interstate motor carriers." *Yellow Transportation*, 537 U.S. at 40.

Specifically, in Section 14504(c)(2)(B)(iii), Congress banned the use of truck decals and "any other means of

[4] H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576. Under the ISTEA, all States were given until September 30, 1996 to come into compliance with the IRP plating program. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1823. Pursuant to 49 U.S.C. § 31704, a State that is not a participant in the IRP may not "establish, maintain, or enforce a commercial motor vehicle registration law that limits the operation of a commercial motor vehicle that is not registered under the laws of the State" if the vehicle is IRP plated in another state.

[5] 49 C.F.R. § 367.3.

registering or identifying specific vehicles operated by the carrier."[6] Congress then adopted the ICC's $10 per-vehicle fee cap by specifying that the SSRS fee system

> *shall . . . result[ ] in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991. . . .*

49 U.S.C. § 14504(c)(2)(B)(iv)(III) (emphasis supplied). Finally, Congress also declared that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a burden on interstate commerce." 49 U.S.C. § 14504(c)(2)(C) (emphasis supplied).[7]

B. Michigan's Fee Structure

Michigan is a longstanding participant in the SSRS and the predecessor "bingo card" program. The Michigan Motor Carrier Act, which is administered by the PSC, prohibits all for-hire motor carriers from engaging in the

[6] Congress's action was originally codified at 49 U.S.C. § 11506 (1994 ed.), but was recodified in nearly identical form at 49 U.S.C. § 14504 effective January 1, 1996.

[7] In 1995, the ICC was abolished by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995). The Federal Highway Administration thereafter adopted the ICC regulations that implemented the SSRS. The regulations remain the same to this day, echoing Congress's determination that "[t]he charging or collection of *any* fee that is not in accordance with the fee system established above is deemed a burden on interstate commerce" and providing that, "[t]o the extent *any* state registration requirement imposes obligations in excess of those specified in this part, the requirement is an unreasonable burden on transportation. . . ." 49 C.F.R. § 367.4(g); (h) (emphasis supplied). The Federal Motor Carrier Safety Administration is now the agency with regulatory authority over the SSRS. 49 U.S.C. § 113(f)(1).

interstate transportation of property in Michigan "without first having registered with the [PSC] and paid the required registration and vehicle fees." Mich. Comp. Laws § 478.7(1). Consistent with the SSRS, Mich. Comp. Laws § 478.7(4) sets the statutory maximum fee levied for each registering interstate carrier at $10 per truck, per annum. Nevertheless, the interstate carriers Petitioners represent pay ten times that amount every year.

In practice, the PSC applies the $10 maximum fee of Mich. Comp. Laws § 478.7(4) only to interstate carriers using vehicles with license plates purchased outside Michigan. J.A. 24-25. If an interstate carrier happens to operate motor vehicles with license plates purchased from the Michigan Secretary of State, the PSC waives the federally-compliant $10 fee and substitutes in its stead a *$100* fee for each vehicle registered. J.A. 8; 24; 59. The $100 fee – referred to herein as the Interstate Decal Fee – is somewhat confusingly authorized by Mich. Comp. Laws § 478.2(2), which requires a $100 fee "for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce."[8]

[8] Michigan Comp. Laws § 478.2(2) is not a model of clarity in its ambiguous reference to "each vehicle . . . registered in this state" given that interstate motor carriers "register" vehicles by buying license plates and also "register" their operations under the SSRS. There is no dispute, however, that it is the interstate motor carrier using trucks with Michigan license plates that pays the $100 fee to the PSC. J.A. 8; 24; 59. In addition, the PSC has consistently represented that it waives the $10 fee when it charges carriers the $100 fee for Michigan-plated trucks. J.A. 59. *See also* J.A. 83 n.6 (citing *Schneider Nat'l Carriers, Inc. v. State*, 247 Mich.App. 716, 721, 637 N.W.2d 838, 840 (2001), *vacated on other grounds*, 468 Mich. 862, 659 N.W.2d 228 (2003)). According to a PSC representative, the "rationale" for the $100 fee is that "vehicles which are license plated in Michigan are based in Michigan, and

(Continued on following page)

Whether an interstate carrier pays $10 or $100 per truck, the PSC requires of all SSRS-registering carriers the same federally-authorized information (evidence of federal operating authority, proof of insurance, and name of service of process agent). J.A. 65-66. However, a footnote on the PSC's form for calculating the $10 SSRS payment directs Michigan-plated interstate carriers to complete an additional PSC form ("Equipment List Form P-344-T") for purposes of paying $100 per truck; registering each truck by make, model, and serial number; and obtaining an identifying decal for each. J.A. 67.[9] Likewise, if a carrier using Michigan-plated trucks registers under the SSRS with a participating State *other* than Michigan, the PSC *still* requires the carrier to file the Equipment List Form P-344-T together with its scheduling of vehicles and $100 per-truck fee payment in exchange for the identifying decal.[10]

Like all PSC fees imposed upon intrastate-operated motor carrier vehicles, both the $10 fee and the $100 Interstate Decal Fee are generally "placed to the credit of the [PSC]" and may be appropriated "to the [PSC] and the motor vehicle highway fund in such proportions as the legislature may determine," except that a designated portion of the $10 fee revenue must be deposited in the

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therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state." J.A. 26.

[9] The Equipment List Form P-344-T may be viewed in the "motor carrier; all forms" section of the PSC's website address at <http://www.michigan.gov/mpsc> (viewed February 22, 2004).

[10] For example, if an interstate carrier registers under the SSRS in Ohio but uses leased motor vehicles that the lessor has plated in Michigan, the Ohio carrier must register the vehicles with the PSC and pay the $100 fee on each one.

Michigan Truck Safety Fund. Mich. Comp. Laws § 478.6; § 478.7(5). The PSC reports that all of its fee revenue for fiscal year 1993-94 was appropriated in varying amounts to various State commissions and departments, including the PSC itself, and generally used by those agencies for economic, insurance, and safety regulation of the Michigan trucking industry; safety education programs; and enforcement of the Michigan Motor Carrier and Motor Carrier Safety Acts. J.A. 12; 28.

C. Proceedings Below

Petitioners brought suit in the Michigan Court of Claims on behalf of all carriers subject to the Interstate Decal Fee and were certified as class representatives authorized to prosecute the action on behalf of similarly-situated class members.[11] Petitioners argued that the Interstate Decal Fee, to the extent it exceeds $10 per vehicle, is preempted by the SSRS. Pet. App. 38. In addition, because class members filed suit on January 3, 1995 and claimed refund rights under a three-year statute of limitations, Petitioners similarly maintained that Interstate Decal Fees exceeding $10 per vehicle were preempted by the federal "bingo card" program in effect before January 1, 1994. Pet. App. 68.

The Court of Claims ruled that the Interstate Decal Fee was not preempted. It decided that the SSRS did not

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[11] The lower court proceedings involved two consolidated cases that presented a combined challenge to both the Interstate Decal Fee and a separate $100 decal fee imposed by Michigan on intrastate-operated motor carrier vehicles. Pet. App. 37. The challenge to the intrastate fee was based upon a number of separate legal grounds, one of which is the subject of the grant of certiorari in No. 03-1230.

preempt the Interstate Decal Fee because the federal $10 per-vehicle fee cap applied to "participating states," but not the "registering state." Pet. App. 46. The Court of Claims also ruled against preemption under the predecessor "bingo card" program based on the same theory that the $10 fee cap imposed by the ICC did not apply to the "state of registration." Pet. App. 70.[12]

Petitioners appealed, and the Michigan Court of Appeals affirmed the Court of Claims ruling on separate grounds. Finding that the statutory language and accompanying federal regulations were clear, the Court of Appeals ruled that the "registration state is simply a participating state in which a motor carrier is registering." J.A. 82. Therefore, reasoned the Court of Appeals, "when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state." *Id.* The Court of Appeals thus rejected the rationale of the Court of Claims. Nevertheless, applying what it characterized as a "general presumption ... against federal preemption," J.A. 73, the Court of Appeals determined that the Interstate Decal Fee is not and has never been preempted because it may be characterized as a "regulatory fee."

Addressing the SSRS first, the Court of Appeals ruled that, if the purpose of a fee is to "regulate an industry or service," it may be classified as a regulatory fee. J.A. 83. From there, the court decided that the Interstate Decal Fee could be classified as a regulatory fee "because it is a

[12] It has never been clear whether the court's use of the terms "registration state" and "state of registration" was a reference to registration under the SSRS and "bingo card" programs or to vehicle "registration" involving the purchase of license plates.

fee imposed for the administration of the [Michigan Motor Carrier Act], particularly covering costs of enforcing safety regulations." J.A. 83. It then concluded that, "[b]ecause the fee ... is not a registration fee, it is not subject to preemption by 49 USC 11506." J.A. 83-84 (referring to 49 U.S.C. § 11506 (1994 ed.) before recodification at Section 14504). The court also ruled that the Interstate Decal Fee, as a "regulatory fee," was similarly "outside the scope of the federal law and was not preempted" under the "bingo card" program. J.A. 86. The Michigan Supreme Court denied further review after timely application by Petitioners. Pet. App. 75.

On January 14, 2005, following the filing of supportive comments by the United States, this Court granted Petitioners' petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Yellow Transportation*, the Court confirmed that Congress's implementation of the SSRS "capped the per-vehicle registration fee that participating States could charge interstate motor carriers" to prove the lawfulness of their interstate operations. 537 U.S. at 40. The decision below, however, permits Michigan and other States to evade Congress's preemptive mandate by conveniently characterizing higher-than-authorized per-truck registration fees as "regulatory" in nature. That decision misinterprets the plain and unambiguous wording of Section 14504, reads a non-existent "regulatory fee" exception into the SSRS, and creates an indefinite and unmanageable loophole in the uniform system Congress designed for the

protection of interstate commerce. For those reasons, the decision below should be reversed.

A. The Michigan Court Of Appeals erroneously dismissed the plain meaning of Section 14504. The statute restricts State registration of interstate carriers to registration with a single base State, prohibits the collection of per-vehicle fees by any State other than the base State, bans vehicle-specific identification and registration, and preempts State assessment of any per-vehicle fee in excess of $10. Michigan's administration and assessment of the $100 per-vehicle Interstate Decal Fee, charged as it is for an interstate carrier's *registration* with the Michigan PSC, violates each of these requirements and most particularly the $10 fee cap of Section 14504(c)(2)(B)(iv)(III). The lower court's characterization of the Interstate Decal Fee as something other than a "registration" fee limited by Section 14504 poses a semantical distinction without a difference.

B. The Michigan court's attempt to read a "regulatory fee" exception into the SSRS is similarly misplaced. Even if the words of Section 14504 were less than clear, an examination of the statute's legislative history demonstrates Congress's intent to reduce interstate carrier costs through a uniform and more limited registration system. It is apparent, however, that Congress's preemptive rule would soon be subsumed by costly and diverse exceptions if States were permitted to circumvent the SSRS by merely labeling flat per-vehicle registration fees as "regulatory" in purpose. Michigan is free to use the federally-authorized $10 fee for any purpose it deems appropriate – and, indeed, uses its $10 and $100 fees for indistinguishable "regulatory" purposes – but the $100 fee's use does not justify its cost any more than its name. Congress's

finding that fees in excess of $10 are a burden on interstate commerce cannot be turned into implied authority for just such a burden merely because Section 14504 does not include the words "regulatory fee" in its directive.

C. Finally, the decision below creates a dangerous loophole in the uniform State registration program Congress designed. The lower court did not attempt to rest its case on any idea that the Interstate Decal Fee is somehow justified by the plating of an interstate truck in Michigan, but the simultaneous implementation of the SSRS and the mileage-based IRP defeats any such hypothesis. Congress's action evidences a dual purpose to both limit flat truck fees nationwide and require fair apportionment of all other vehicle fees imposed on interstate truckers. The Interstate Decal Fee and the Michigan Court of Appeals ruling upholding it, however, undermine Congress's goals. Accordingly, neither can withstand review.

ARGUMENT

A. The Michigan Court Of Appeals Erred In Failing To Enforce The Plain Meaning Of 49 U.S.C. § 14504

The first task in statutory interpretation – and often the only one – "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If the meaning of the statutory language is clear, the statute should be enforced straightforwardly according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). Put another way, when there is no ambiguity in the statute's

words, "'there is no room for construction'" and no real need for judicial translation applies. *United States v. Gonzales*, 520 U.S. 1, 8 (1997) (quoting *United States v. Wiltberger*, 18 U.S. 76, 96 (1820)). That rule is dispositive in this case because Congress's preemptive meaning is abundantly clear.

1. In Section 14504, Congress listed plain-spoken standards for State registration of interstate motor carriers, declaring that "[w]hen a State registration requirement imposes obligations in excess of the standards . . . the part in excess is an unreasonable burden [on interstate transportation]." 49 U.S.C. § 14504(b). One such standard is that an interstate motor carrier may be compelled to register with only one "base" State, and "such single State registration shall be deemed to satisfy the registration requirements of all other States." 49 U.S.C. §§ 14504(c)(1)(A); (C). Another standard is that only the "base" State may collect fees on behalf of itself and other participating States. 49 U.S.C. § 14504(c); (2)(A)(iii). Further, no State may require "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier." 49 U.S.C. § 14504(c)(2)(B)(iii). And finally, the flat per-vehicle fee collected on behalf of any participating State is "not to exceed $10 per vehicle." 49 U.S.C. § 14504(c)(2)(B)(iv)(III).

Michigan's assessment of the Interstate Decal Fee on carriers engaged solely in interstate commerce fails to comply with each of these requirements. Even if an interstate carrier using Michigan-plated trucks registers under the SSRS with another State, it must still register its operations with and pay per-truck fees to the Michigan PSC, despite the mandate of Section 14504(c)(1)(C) that registration with a carrier's "base" SSRS State satisfies

"the registration requirements of *all* other States." (Emphasis supplied).[13] All Michigan-plated interstate carriers must also purchase a vehicle-identifying decal for each of their trucks even though Section 14504(c)(2)(B)(iii) bans such devices. Most importantly, the $100 fee Michigan-plated carriers pay is ten times the $10 permitted under the SSRS. The SSRS, however, draws no distinction between carriers using trucks plated in Michigan and carriers using trucks plated elsewhere. Rather, the SSRS requirements, including the $10 fee cap, apply without exception to *all* interstate motor carriers compelled to register their operations with *any* State regulatory commission under any State law. As a result, the $100 Interstate Decal Fee violates Section 14504 and is accordingly preempted.

2. The Michigan Court of Appeals imposed a strained construction upon Section 14504, ruling that Congress limited only the assessment of State "registration" fees, not those that may be labeled "regulatory" in nature. The court's narrow interpretation, however, is based upon an ill-conceived "presumption . . . against preemption" (J.A. 73). This Court has ruled that there exists no presumption against preemption when the matter at hand is "inherently federal in character" or when "the State regulates in an area where there has been a history of significant federal presence." *Buckman Co. v. Plaintiffs' Legal Committee*, 531

[13] Note that the "base state" requirements of the SSRS and the mileage-based IRP are different, such that a carrier may be SSRS-registered in one State while purchasing its license plates in another. Under 49 C.F.R. § 367.3, the "base" State for SSRS purposes is generally a carrier's *principal* place of business, whereas the "base" jurisdiction for IRP plating can be any State in which *a* place of business exists. International Registration Plan, Art. II, §§ 210, 218 (2003 rev.).

U.S. 341, 347-348 (2001); *United States v. Locke*, 529 U.S. 89, 108 (2000). This case presents just such a setting because the SSRS finds its roots in the Interstate Commerce Act, which is "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).[14] Consequently, no presumption against preemption is at issue here, and the Michigan court's attempt to statutorily construct its way out of preemption conflicts with the cardinal rule that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). *See also Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S.Ct. 1756, 1763 (2004) (declining to invoke the "presumption against preemption" to determine the *scope* of federal preemption).

In short, it is "well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive." *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404, 408 (1925). And for almost forty years, Congressional action has evidenced a conspicuous exercise of that authority over State regulatory commission registration of interstate carriers and their motor vehicles moving in interstate commerce. Congress made plain its view early on that State registration requirements in excess of the ICC's

[14] "Since the turn of the [twentieth] century," this Court has "frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with Congressional policy as reflected in the [Interstate Commerce] Act." *Id.*

standards were "an unreasonable burden on [interstate transportation]," 49 U.S.C. § 11506(b) (1988 ed.), and the resulting ICC regulations imposing the $10 fee cap under the "bingo card" program were thereby afforded no less preemptive effect than the federal statute under which they were promulgated. *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress then confirmed the preemptive scope of its action in 1991 with the adoption of the ICC's $10 per-vehicle fee cap, the directive that "single State registration shall be deemed to satisfy the registration requirements of *all* other States," and the statutory mandate that "[t]he charging or collection of *any* fee under this section that is not in accordance with th[is] fee system . . . shall be deemed to be a burden on interstate commerce." 49 U.S.C. §§ 14504(c)(1)(C); (c)(2)(C) (emphasis supplied). There can be no question, therefore, of Congress's meaning.

Surely the Michigan Court of Appeals' restrictive construction of Section 14504 is a classic example of elevating form over substance. The Interstate Decal Fee is just as much a "registration" fee preempted by the SSRS as is the $10 fee Michigan charges carriers that purchase their license plates elsewhere. Under Michigan law, *every* interstate carrier, regardless of the State in which it plates its vehicles, is prohibited from engaging in the interstate transportation of property in Michigan "without first having *registered* with the [PSC] and paid the required *registration* and vehicle fees." Mich. Comp. Laws § 478.7(1) (emphasis supplied). Michigan-plated carriers – just like carriers that purchase their license plates in other States – must file proof of federal operating authority, submit evidence of insurance, and name their agent for service of process purposes when they register with Michigan under

the SSRS. The singular difference between the two carriers is that a footnote on Michigan's SSRS form directs the Michigan-plated carrier to pay $100 instead of $10 per vehicle and to complete another form for the prohibited purpose of identifying its trucks by make, model, and serial number to obtain a decal for each. In substance, Michigan-plated carriers "register" with the PSC for the price of $100 per truck, whether Michigan calls the assessed fee a "registration" fee or not.

3. Other courts have recognized the preemptive impact of Congress's registration standards notwithstanding the names ascribed to the fees in question. The first two reported cases arose in Montana and addressed ICC regulations that, at the time, permitted a $5 maximum fee for the registration and identification of interstate vehicles under the "bingo card" program. In the first decision, *State ex rel. Sammons Trucking, Inc. v. Boedecker*, 158 Mont. 397, 492 P.2d 919 (1972) struck down a $10 "license fee," *id.* at 398, 492 P.2d at 919, ruling that "Congress has preempted the field of state regulation and identification of interstate motor vehicles using Montana highways." *Id.* at 400, 492 P.2d at 920. Similarly, *State ex rel. Sammons Trucking, Inc. v. Bollinger*, 169 Mont. 88, 544 P.2d 1235 (1976) nullified the State's attempt to impose the reduced $5 license fee on both the motorized unit and the trailer in a tractor-trailer combination. The court again expressed no hesitation in finding that the ICC regulations were controlling and that State statutes imposing greater or conflicting requirements "constitute an undue burden on interstate commerce and must yield to federal authority." *Id.* at 92, 544 P.2d at 1236. In neither case did the court express any concern over the "license" fee's name.

The Illinois case of *Roadway Express, Inc. v. Treasurer*, 120 Ill.App.3d 133, 458 N.E.2d 66 (1983) is slightly different, but equally persuasive. The issue addressed in *Roadway* was whether Illinois law complied with pre-1982 ICC regulations that permitted a $5 per-vehicle fee, but also authorized States to charge additional "regulatory fees" in order to defray the costs of trucking regulation. The "franchise fee" charged by Illinois (the name of which played no role in the court's decision) was not used for such a specific "regulatory" purpose, and so refunds of all fees paid in excess of $5 per vehicle were ordered. Importantly, the court also observed that no additional "regulatory fee" would be permissible after 1981 because the ICC amended its regulation in 1982 to "set an absolute limit of $10 on identification stamp fees" for all future operations. *Id.* at 135, 455 N.E.2d at 69.[15]

The Michigan Court of Appeals summarily dismissed this precedent based upon its attempted regulatory/registration fee distinction. J.A. 86-87 n.8. Again, however, the $100 Interstate Decal Fee is just as much a "registration fee" as the fees struck down in Montana and Illinois. Regardless of its nomenclature, the fee is collected in connection with a State regulatory commission's registration of interstate carriers and their interstate motor

[15] Although the Court has limited the question presented here to the SSRS portion of Petitioners' claim, the *Roadway* decision illustrates that the Interstate Decal Fee was no less preempted under the old "bingo card" program in effect for many years prior to the SSRS's implementation.

vehicles, which the Montana and Illinois courts rightly concluded is a subject plainly preempted by federal law.[16]

Even without the guidance of such precedent, however, the lower court could have resolved this case by application of two uncomplicated principles. First, statutory construction starts with the assumption that the ordinary meaning of Congress's words accurately express its purpose. *Engine Manufacturers Ass'n*, 124 S.Ct. at 1761 (2004). Second, when a federal statute unambiguously forbids State action on an industry affecting interstate commerce, courts need not look beyond the plain meaning of the statute to decide whether the challenged State action is preempted. *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 (1983). Notwithstanding the lower court's characterization of the Interstate Decal Fee as something other than a "registration fee" preempted by Section 14504, just the opposite conclusion is self-evident.

[16] The Michigan Court of Appeals' reliance on *Franks & Son, Inc. v. State*, 136 Wash.2d 737, 966 P.2d 1232 (1998), *cert. denied*, 526 U.S. 1066 (1999) is just as misplaced as its attempt to distinguish the Montana and Illinois decisions. In addressing an issue not raised in the later petition for certiorari, the *Franks & Son* court made the same "form over substance" mistake in ruling that a Washington regulatory fee exceeding the $10 "bingo card" fee was not preempted. But in citing *Franks & Son* the court below overlooked the fact that the Washington legislature had repealed its additional regulatory fee upon implementation of the SSRS because "[t]he Congressional decision that each state could not register all carriers doing business in that state made it administratively difficult to impose any further regulatory fee. . . ." *Id.* at 745, 966 P.2d at 1236. Therefore, whatever its relevance to an evaluation of the "bingo card" program (and despite the Washington court's convenient reference to "administrative difficulty"), the *Franks & Son* ruling has no significance to the broad preemptive directive of Section 14504(c)(1)(C) that registration with a single base State under the SSRS "shall be deemed to satisfy the registration requirements of all other States."

Interstate carriers operating Michigan-plated trucks pay the Interstate Decal Fee because they are required to be "*registered* with" and pay "the required *registration* and vehicle fees" to the PSC for the privilege of operating interstate across Michigan's borders. Mich. Comp. Laws § 478.7(1) (emphasis supplied).[17] The $100 Interstate Decal Fee charged for that privilege is preempted, and the Michigan court erred in concluding otherwise.

B. The SSRS Has No "Regulatory Fee" Exception

Bypassing the express directive of the SSRS legislation, the Michigan Court of Appeals upheld the Interstate Decal Fee by finding it to be a so-called "regulatory fee" falling outside the preemptive scope of Section 14504. Even if the statute required some "interpretation" of Congress's meaning, the Court of Appeals' reasoning is flawed. No construction of the SSRS leaves room for a "regulatory fee" exception, because neither the label attached to the Interstate Decal Fee nor the use to which its revenue is put makes any legal difference to the preemption question presented.

1. In the first instance, the Michigan Court of Appeals disregarded Congress's conspicuous intent. Nothing in Congress's mandate authorizes State regulatory commissions to charge a per-vehicle fee in excess of $10, and nothing in the SSRS regulations or in the legislative history of the ISTEA suggests that anything more than

[17] Indeed, the PSC's Equipment List Form P-344-T calls for payment of "registration fees" and the "registration" of vehicles that must be identified by make, model, and serial number. *See* <http://www.michigan.gov/mpsc> (motor carrier; all forms) (viewed February 22, 2004).

$10 per vehicle is authorized. *See* 49 C.F.R. § 367.4. To the contrary, Congress expressed concern over industry estimates that the "bingo card" program was costing carriers "up to $250 million per year," and it thus sought "to benefit the interstate carriers by eliminating unnecessary compliance burdens" in the hope that consumers too would profit from resulting cost savings. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. In other words, it was Congress's goal to establish "a fee system . . . that . . . minimizes the costs of complying with the registration system," which conflicts directly with any notion that States are free to increase carrier costs by tacking on additional fee expense over and above the $10 per-vehicle fee cap. 49 U.S.C. § 14504(c)(2)(B)(iv)(II).

The Court of Appeals also mistakenly decided that "regulatory fees" are not preempted because they are not expressly prohibited. J.A. 85 n.7. Even if Section 14504 were not clear, State law yields under the Supremacy Clause if it "stands as an obstacle" to full implementation of the federal law, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), or otherwise frustrates accomplishment of a federal objective. *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). In this regard, the Michigan court missed the obvious point that, if States could circumvent the SSRS by calling any flat, per-truck assessment a "regulatory fee," the uniform plan Congress designed would become so riddled with exceptions as to lose all force and effect. Preemption analysis, therefore, must rest upon something far more substantial than the label Michigan assigns to its fee. *See Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 127-28 (1993) (State may not avoid preemption by changing the name of its tax); *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160,

164 n.3 (1980) (transaction privilege tax was preempted by Indian trader statutes "regardless of the label" placed upon it). *See also City of Detroit v. Murray Corp.*, 355 U.S. 489, 492 (1958) (in determining constitutionality of a tax, "we must look through form and behind labels to substance").

In any event, the Court of Appeals applies a backwards analysis in searching for the words "regulatory fee" in Section 14504. Congress took specific action in the statute to declare that flat vehicle fees in excess of $10 are a burden on interstate commerce. The backdrop of that action is this Court's dormant Commerce Clause jurisprudence, which acknowledges that flat unapportioned truck fees are unreasonably burdensome to interstate carriers. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). And while Congress certainly has the power to authorize State-imposed burdens on interstate trade, legislative intent to do so may not be merely inferred. *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003). To the contrary, Congress must "manifest its unambiguous intent" and demonstrate a meaning that is "unmistakably clear" before a federal statute will be read to remove State regulation from the reach of the dormant Commerce Clause. *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). In short, Section 14504 cannot be read to impliedly authorize "regulatory fees" simply because Congress failed to use the phrase "regulatory fee" in its preemptive directive.

2. The commonsense conclusion is that the Michigan court's regulatory fee theory poses a distinction with only one real difference – a difference of $90. As we have shown, the $100 Interstate Decal Fee is just as much a

"registration fee" as the $10 fee authorized under the SSRS because Michigan Comp. Laws § 478.7(1) requires all interstate carriers to be "*registered*" with the PSC and the Interstate Decal Fee is assessed in exchange for an identification device – a decal that is affixed to a vehicle the interstate carrier must *register* with the PSC by make, model, and serial number. By the same token, the $10 SSRS fee is no less a "regulatory fee" than the $100 Interstate Decal Fee because both are unquestionably put to *some* "regulatory" purpose. Each is "placed to the credit of the [PSC]" under Mich. Comp. Laws § 478.6, and, after a designated portion of the $10 SSRS fee is deposited in the Michigan Truck Safety Fund pursuant to Mich. Comp. Laws § 478.7(5) (where it is put to "regulatory" use), both fees are then combined with all other PSC fee revenue and appropriated to the same "regulatory" agencies for the same "regulatory" purposes. J.A. 12; 28. The prohibited Interstate Decal Fee, therefore, serves no more regulatory purpose than the $10 fee States are permitted, but restricted to, under the SSRS.[18]

[18] In this regard, the Court of Appeals' citation to 49 C.F.R. § 1023.105 (1991) (J.A. 84) actually proves Petitioners' point. By urging States to use the $10 per-vehicle fee "for the purpose of defraying the cost of regulation," the regulation illustrates that $10 was to be the States' "regulatory fee" charge. In contrast, the Court of Appeals' citation to 49 C.F.R. § 1023.104 (1991) (J.A. 84) cannot support its decision. That regulation, which stated that the ICC's standards should not be construed "to affect the collection or method of collection of taxes or fees by a State from motor carriers for the operation of vehicles within the borders of such State," was not adopted with the 1993 amendments creating the SSRS regulations and is not current law. In addition, the regulation can only be "squared" with the ICC's longstanding $10 fee cap if it is interpreted as authorizing something *other than* per-vehicle identification fees specific to interstate motor carriers, such

(Continued on following page)

Accordingly, the "regulatory fee" theory is a too-convenient, unconvincing defense against the Interstate Decal Fee's preemption. When State regulatory commissions like the PSC require interstate carriers to register their operations, the $10 SSRS fee is the *only* per-vehicle "regulatory fee" authorized by Congress's preemptive act. The Michigan Court of Appeals decision to the contrary is plainly incorrect.

C. The Interstate Decal Fee Has No Place In The Uniform Federal Plan Congress Envisioned

The decision below fails to give appropriate deference to Congress's powers and creates a proverbial loophole through which States may escape time-honored federal authority and cause real harm to interstate motor carrier operations. That loophole cannot withstand reasoned scrutiny.

1. The Michigan "regulatory fee" approach, if adopted by other States, poses a significant threat to Congress's goal of reducing the regulatory burdens imposed upon interstate motor carriers. From the very beginning, Congress sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" when it implemented the "bingo card" program in 1965. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. In so doing, Congress hoped to make registration requirements imposed by State regulatory commissions uniform. *Id.* Then, in 1991, the SSRS was designed as a more "streamlined administrative

as the properly-apportioned income, fuel, property, and license plate taxes and fees that motor carriers otherwise pay.

process" so as to reduce inefficiencies, eliminate unnecessary compliance burdens, and lessen carriers' costs. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817. The decision below undermines each one of those goals by signaling every State to add to its $10 SSRS fee any "regulatory fee" amount it chooses, which would subject interstate carriers to a whole host of flat fees and vehicle registration requirements varying from State to State and would thus make compliance more burdensome, less efficient, and certainly more costly.

Moreover, because any fee can be put to *some* later regulatory use, the opinion below invites each of the 39 SSRS States to increase its $10 fee by any amount it can expediently call "regulatory" in purpose. Interstate truckers, no longer protected by the $10 fee cap, would then be at the mercy of State legislatures in need of revenue with every incentive to decide that $10 or even $100 per vehicle is not enough for their "regulatory" needs. And because the Michigan court's ruling does not in any way limit the "regulatory fee" justification to trucks plated within the State, other jurisdictions may more expansively apply their fees to all interstate vehicles operated by any SSRS-registering carrier. The decision below thus sends a message that, if $100 for Michigan-plated trucks is permissible in Michigan, then $500 or $1,000 for every truck crossing Ohio, Kansas, or any other SSRS State is perfectly acceptable too.

2. Lest there be some question, the Interstate Decal Fee cannot rest upon a hypothetical proposition (not even suggested by the Court of Appeals) that Michigan-plated vehicles somehow have a greater Michigan "presence" than vehicles plated elsewhere. In fact, the PSC's "rationale" for the fee – that Michigan-plated vehicles are "based"

in Michigan and make greater use of Michigan highways and services[19] – is neither premised on legislative finding nor grounded on any hard evidence. Interstate carriers plate their vehicles under the IRP, which authorizes "base-plating" in a single State that then collects, distributes, and apportions all other States' vehicle plating fees on a mileage basis. Michigan may be the base-plating State under the IRP merely because a motor carrier accrues mileage in Michigan and has a place of business there with a telephone line and an employee to make operational records available,[20] none of which demands a great "regulatory presence" or even requires that vehicles be actually "based" within the State's borders. Thus, large Michigan-headquartered carriers with significant Michigan operations can side-step the Interstate Decal Fee entirely by plating vehicles at one of their many out-of-state terminals, while small carriers with limited fleets and only a single terminal in Michigan must still pay $100 per truck whatever their level of "presence" on Michigan's highways and roads.

Regardless, any attempt to justify the Interstate Decal Fee on grounds related to a vehicle's use of the highways brings us full circle to the dormant Commerce Clause. As this Court explained in *Scheiner*, flat per-vehicle fees and taxes, by definition, "do not even purport to approximate fairly the cost or value of the use of [the] roads" and impose an undue burden on interstate commerce because their measure "'bears no relationship to the taxpayers' presence or activities in a State. . . .'" 483 U.S. at 290-91

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[19] J.A. 26.

[20] International Registration Plan, Art. II, §§ 210, 218 (2003 rev.).

(quoting *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 629 (1981)). It is an ironic twist, therefore, that Michigan applies the Interstate Decal Fee only to interstate vehicles IRP-plated in Michigan *and* attempts to justify the flat fee as somehow "presence"-based when the mileage-apportioned fees of the IRP were specifically contrasted with the flat per-vehicle taxes at issue in *Scheiner* and identified as Commerce Clause-compliant. *Id.* at 271-73; 282-83.

A second irony is that the IRP arises out of the same federal legislation that implemented the SSRS. Like the SSRS, the IRP was also adopted by the ISTEA in 1991[21] as part of a uniform, national plan to benefit interstate carriers. Just as it was concerned about creating uniformity and reducing costs in implementing the SSRS, Congress similarly standardized the IRP after heeding the House Public Works and Transportation Committee's advice that "[c]ompetition in the world marketplace dictates the elimination of unnecessary costs and the maximizing of efficiency." H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1575. The key ingredient to the IRP, of course, is the apportionment of plating fees based upon the number of miles the carrier travels in each State, which not only passes constitutional muster, but also "reduces the motor carrier's overall operating costs."[22] It is not likely, therefore, that Congress could have intended to afford States free reign to increase the cost of either SSRS registration *or* IRP plating through

[21] H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1823.

[22] H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1576.

the tacking on of a myriad of flat, unapportioned "regulatory fees" that frustrate the very purpose of Congress's action.

In sum, the lower court decision in this case should be overturned because it invites inconsistent, burdensome, and costly State regulation of interstate carriers and interferes with the uniform federal regulatory plan Congress has long envisioned. Enforcement of Congress's plan leads to the inescapable conclusion that Michigan's $100 Interstate Decal Fee upon vehicles operated solely in interstate commerce violates Section 14504 and is thus preempted under the Supremacy Clause of the U.S. Constitution. Any other result would render ineffective Congress's finding that flat per-vehicle registration fees imposed by State regulatory commissions burden interstate commerce and are forbidden by federal law unless limited to $10.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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Nos. 03-1230 and 03-1234

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
and USF HOLLAND, INC.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

MID-CON FREIGHT SYSTEMS, INC ET AL.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari
To The Michigan Court of Appeals

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QUESTIONS PRESENTED

1. Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

2. Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 USC 14504.

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TABLE OF AUTHORITIES

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Cases

Aero Mayflower Transit Co v Bd of Railroad Comm'rs,
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American Trucking Ass'ns v O'Neill,
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American Trucking Ass'ns, Inc v Scheiner,
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Armco, Inc v Hardy,
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Bennett v Spear,
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Bode v Barrett,
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Camps Newfound/Owatonna v Town of Harrison,
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Capitol Greyhound Lines v Brice,
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Chemical Waste Mgmt, Inc v Hunt,
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Cipollone v Ligget Group, Inc,
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City of Chicago v Willet Co,
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City of Columbus, et al v Ours Garage and Wrecker Service, Inc,
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Commonwealth Edison v Montana,
453 US 609 (1980) 18, 27

Complete Auto Transit, Inc v Brady,
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Container Corp of America v Franchise Tax Bd,
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Dunbar-Stanley Studies, Inc v Alabama,
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Florida Lime and Avocado Growers v Paul,
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Franks and Sons v Washington,
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Fulton Corp v Faulkner,
516 US 325 (1996) 19, 20

Huron-Portland Cement Co v Detroit,
362 US 440 (1960) 30

In re: Alternative Minimum Tax Refund Cases,
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Interstate Towing Ass'n v City of Cincinnati,
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Lewis v BT Investment Managers, Inc,
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Louisiana Public Service Comm v Federal Communications Comm,
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Maine v Taylor,
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National Cable Television Ass'n v United States,
415 US 336 (1974) 28

New York Blue Cross v Travelers Ins,
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Nippert v City of Richmond,
327 US 416 (1946) 5, 22

Oklahoma Tax Comm v Jefferson Lines, Inc,
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Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon,
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Osborne v Florida,
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Pacific Gas & Electric Co v California Energy Resources Conservation and Development Comm,
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Pullman Co v Adams,
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Roadway Express, Inc v State Treasurer,
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Spector Motor Service v O'Connor,
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State Ex Rel Sammons Trucking, Inc v Boedecker,
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United States v Freeman,
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V-1 Oil Co v Utah,
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Other Authorities

H R Rep No. 253, 89th Cong, 1st Sess, *reprinted in* 1965 USCCAN 2923 36

Hellerstein, *Is 'Internal Consistency' Foolish?; Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH L REV 138 (1988) 23

Pub L 105-277, Div C, Title I, Oct. 21, 1998, 112 Stat 2681-586 42

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STATEMENT

A. The Michigan Motor Carrier Act.

The intrastate fee and the interstate fee at issue in these consolidated cases are part of a fee system contained in the Michigan Motor Carrier Act, Mich Comp Law (MCL) 475.1 *et seq*, that was originally enacted in 1933 to promote safety and conserve the use of Michigan highways. While the motor carrier transportation industry provides a public service, it also increases the risk of harm to the traveling public and damage to the public highways. J.A. 17. Because of that, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes. J.A. 17.[1] Under MCL 478.6, all fees collected under the Motor Carrier Act are placed to the credit of the Michigan Public Service Commission (MPSC) and the motor vehicle highway fund.

The motor carrier fees collected under the Motor Carrier Act go to the MPSC and the Motor Carrier Division of the Michigan State Police administration of that Act and for safety enforcement of the motor carrier industry. J.A. 21-22. Among the safety functions enforced are: vehicle requirements (e.g. brakes, oversize, overweight, load securement); driver requirements (e.g. hours of service, medical certificates); drug and alcohol testing requirements; safety inspections and audits; regulation of movement of hazardous waste. J.A. 12, 29-30. The Motor Carrier Division, through agreements, also enforces federal

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[1] According to the 1993-1994 National Association of Regulatory Utility Commissioners (NARUC) compilation of transportation regulatory policy, 45 States and U.S. Territories have some form of regulation of common carriers. The vast majority of these States and Territories also regulate insurance (45 States), safety (33 States) as well as the registration of interstate carriers (37 states). Thirty-nine States also assess a fee for intrastate registration of motor carrier operations. Thirty-two States or Territories utilize an identification device for vehicles such as a decal or stamp. A few States also regulate private carriers. J.A. 21.

requirements under Title XII of Pub L 99-570 and the Federal Motor Carrier Regulations, that are administered by the Federal Highway Administration of the U.S. Department of Transportation. J.A. 30. The enforcement of federal standards by the States with respect to motor carriers is not unusual. As Thomas Lonergan, Director of the Motor Carrier Regulation Division of the MPSC, noted in his affidavit regarding the enforcement of the Single State Registration System (SSRS), "[t]he ICC [Interstate Commerce Commission] has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on states for this purpose under the SSRS system." J.A. 20.

1. The Intrastate Fee.

Under MCL 478.2(1), motor carriers operating intrastate holding a certificate of authority issued by the MPSC are required to purchase a decal for each power unit for a fee of $100.[2] J.A. 23. This decal is affixed to the door of the vehicle and identifies that the carrier has paid the fee. J.A. 23. Each calendar year the decal must be replaced. J.A. 23. MCL 478.2(1) further authorizes a six-month decal for a fee of $50 after July 1. Also, under MCL 478.2(3) a motor carrier may purchase a temporary 72-hour permit for a fee of $10.[3] Therefore, such a motor carrier that is only involved in occasional or incidental intrastate commerce may obtain a $10 temporary permit. J.A. 63-64.

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[2] Before purchasing an intrastate decal, a for-hire motor carrier wishing to operate in Michigan, must first obtain a certificate of authority under MCL 478.1. J.A. 23. Neither this certificate requirement nor its corresponding fee are challenged in this case.

[3] In order to purchase a temporary 72-hour permit a motor carrier must have a certificate of authority under MCL 478.1 and have at least one truck with a MCL 478.2(1) intrastate decal. According to the MPSC's 2004 Annual Report a total of 4,928 temporary 72-hour permits were issued. See, <http://222.michigan.gov/documents/2004mpsc_annual_report_117786 _7. pdf>(accessed March 24, 2005)

The intrastate fee is the largest source of revenue for motor carrier regulatory functions performed by the MPSC and the Michigan State Police, Motor Carrier Division. J.A. 24. In the calendar year 1994, the MPSC collected approximately $2,905,000 in intrastate vehicle decal fees. J.A. 24.

2. The Interstate Fee.

The interstate fee is authorized by MCL 478.2(2). The fee is $100 per calendar year per vehicle, or $50 after July 1. J.A. 24. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. J.A. 24. The fee is paid by an interstate motor carrier on vehicles registered and licensed plated through the Michigan Secretary of State. J.A. 24. An interstate motor carrier that license-plates its vehicles in any other state or province does not pay this fee. J.A. 24. In the calendar year 1994, the MPSC collected approximately $751,000 in interstate vehicle decal fees.

B. The Michigan Court of Appeals Decision.

The Michigan Court of Appeals below upheld both the MCL 478.2(1) intrastate fee and the MCL 478.2(2) interstate fee, as lawful regulatory fees. The Court held that the intrastate fee did not violate the Commerce Clause since it did not raise a significant barrier to participation in interstate trade. It found that the Petitioner American Trucking Associations' (ATA) claim that MCL 478.2(1) burdened interstate commerce was "a matter of pure speculation" and that the ATA "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." J.A. 101. The Court held that any effect the intrastate fee had on interstate commerce was incidental and did not rise to the level of discrimination. The Court of Appeals determined that the fee served a legitimate and non-discriminatory purpose and held that this was "an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways." *Id.* It then concluded, "[o]n the basis of record before us, we cannot say that

the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." J.A. 102.

The Michigan Court of Appeals also rejected the claim of the Petitioners Mid-Con Freight Systems, Inc., *et al* (collectively Mid-Con) and held that because the interstate fee was a regulatory fee and not a registration fee, it was not preempted by 49 USC 14504. J.A. 83-84. Petitioners ATA and Mid-Con both filed applications for leave to review to the Michigan Supreme Court, that were denied. 469 Mich 969; 673 NW2d 753 (2003).

SUMMARY OF ARGUMENT

In 03-1230, citing this Court's decision in *American Trucking Ass'ns, Inc v Scheiner,* 483 US 266 (1987), ATA argues that the intrastate fee violates the Commerce Clause because it is discriminatory and not fairly apportioned. In *Scheiner,* however, this Court held that a flat state tax or fee will not be held to be discriminatory when it is the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. Such is the case here inasmuch as anything other than a flat fee would be both impracticable and pose an administrative burden.

The intrastate fee is fairly apportioned in that the fee does not constitute a tax on the interstate business' unitary income, but is rather assessed on a discrete event that can only occur in a single state. Moreover, in a line of cases beginning with *Osborne v Florida,* 164 US 650 (1897), this Court upheld the validity of a flat tax, that is not imposed upon the business of the company that is interstate, reasoning that no harm results to the company since it can freely conduct its interstate business without paying the slightest heed to an intrastate fee or tax.

ATA argues that this Court may look solely to the structure of the intrastate fee to see whether it's internally consistent, and with nothing more, make a determination that its practical consequences discriminates against interstate commerce. This

Court, however, has never struck down a law that did not facially discriminate as internally inconsistent by relying on a hypothetical taxpayer with a specific structure of factors and taxable income. As to determining the practical consequences, the Respondents believe the better view is that a fee or tax, that is not facially discriminatory, should only be held to be internally inconsistent if the structure of the tax can be shown by actual evidence to burden interstate commerce. As this Court noted in *Nippert v City of Richmond,* 327 US 416, 431 (1946) in judging the validity of a tax, it is "its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." The Court then cautioned that "[t]o ignore the variations in effect which follow from application of the tax to highly different fact situations is only to ignore those practical consequences." *Id*

ATA's reading of this Court's decisions would achieve a radical and unsettling result whereby broad categories of flat, unapportioned state fees, such as annual business licenses or professional licenses would be at risk. Even more concerning is that all these laws would be placed in jeopardy based upon a calculus of hypothetical facts that dispenses with the need for actual, proven facts of discrimination.

ATA's argument that the Michigan Court of Appeals' decision constitutes a manifest evasion of this Court's precedents fails to pay heed to the important policy considerations at issue in this case. The Michigan Court of Appeals, two federal circuits and a State supreme court have all determined that the power of a State or municipality to regulate an activity to protect the safety and welfare of citizens and to charge a fee to help defray the regulatory costs incurred should be judged according to the balancing test employed by this Court in *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970). Such a view represents a fair balancing of the interests involved in the competing concerns between the Commerce Clause and a State's police power.

In 03-1234, Mid-Con asks this Court to overturn the Michigan Court of Appeals' decision that the interstate fee is not preempted by federal law, specifically the Single State Registration System (SSRS), 49 USC 14504. Mid-Con argues that the plain language of Section 14504 expressly capped the per-truck fee at $10 that State regulatory commissions may levy against interstate motor carriers and that the Michigan Court of Appeals erroneously read into Section 14504 a non-existent regulatory exception.

As is clear from the text of Section 14504 itself and well as its legislative history, Section 14504 relates solely to the fees that a State may charge for filing proof of insurance and registration of its federal authority with the State. The Michigan interstate fee has nothing to do with the registering of the motor carrier's federal authority with the State. Michigan's interstate fee is assessed against Michigan-plated vehicles to help defray the safety and administrative costs of the MPSC and the Motor Carrier Division of the Michigan State Police. The Michigan Court of Appeals correctly interpreted Section 14504 and properly found that MCL 478.2(2) was not preempted.

ARGUMENT

I. The intrastate fee does not violate the Commerce Clause.

The Commerce Clause provides that "Congress shall have the Power . . . [t]o Regulate Commerce . . . among the several States." US Const, art I, § 8, cl 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon*, 511 US 93, 98 (1994).

In *Western Live Stock v Bureau of Revenue*, 303 US 250, 254 (1938), this Court noted that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce

from their just share of state tax burden even though it increases the cost of doing the business." In *Complete Auto Transit, Inc v Brady*, 430 US 274, 279 (1977), the Court noted that its prior decisions established that it is not the formal language of the tax statute but rather its practical effect that is determinative. The Court then held that a state tax would survive a Commerce Clause challenge when the tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Id.*

ATA's primary argument is that the intrastate fee is a tax that does not satisfy the second and third prongs of the test in *Complete Auto* and is contrary to this Court's decision in *American Trucking Ass'ns, Inc v Scheiner*, 483 US 266 (1987). While the Respondents do not agree that the intrastate fee is a tax (see Argument I.C. *infra*), it is clear that it is nonetheless valid when analyzed under these cases.

A. The intrastate fee does not discriminate against interstate commerce.

1. MCL 478.2(1) is not a protectionist measure but rather is a law that addresses legitimate local concerns with only incidental effects on interstate commerce.

This Court has held that, when analyzing any law under the negative Commerce Clause, the first step is to determine whether it regulates even-handedly with only "incidental" effects on interstate commerce or discriminates against interstate commerce. *Oregon Waste Systems*, 511 US at 99 (1994). Although this Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes, it has held that "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Id.* Generally, a tax will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of a "sensitive, case-by-case analysis of purposes and effects, the provision" will in

practical operation work discrimination against interstate commerce by providing a direct commercial advantage to local business. *West Lynn Creamery v Healy,* 512 US 186, 201 (1994); *Bacchus Imports, Ltd v Dias,* 468 US 263, 268 (1984). In short, the "crucial inquiry" is to determine whether the fee or tax is basically a protectionist measure or whether it can fairly be viewed as a law directed towards legitimate local concerns, with effects on interstate commerce that are only incidental. *Philadelphia v New Jersey,* 437 US 617, 624 (1978).

The intrastate fee under MCL 478.2(1) is imposed uniformly on both in-state and out-of-state vehicles. Therefore, it is not facially discriminatory. Nor does the fee constitute a protectionist measure since it does not erect a barrier to entry. Payment of the fee is not required of a motor carrier vehicle wishing to conduct interstate operations on Michigan highways. Lastly, the intrastate fee under MCL 478.2(1) is plainly directed toward legitimate local purposes, i.e., funding safety and related regulations, a point specifically noted by the Michigan Court of Appeals below. (MCL 478.2(1) "is an exercise of the state's police power and serves the critical function in protecting the people who use Michigan highways." J.A. 101.)

Citing this Court's decision in *Scheiner*, ATA argues that the intrastate fee is discriminatory. In *Scheiner*, the Court held that a flat marker fee and a flat axle tax assessed by Pennsylvania on each truck traveling through the state -- whether registered there or not -- violated the Commerce Clause. The Court found that the flat taxes imposed a substantially higher effective rate on trucks registered outside of Pennsylvania, with the lower effective tax rate inuring to the benefit of the local truckers. The Court noted that "[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id,* 483 US at 269, n 1. In this context, the Court added that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it

imposes on its own residents who also engage in commerce among the States." *Id,* 483 US at 282. The Court, however, specifically created an exception to its holding. And it is that exception that sustains the constitutional validity of the intrastate fee.

2. In *Scheiner*, this Court held that a flat tax does not violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.

In *Scheiner*, the Court held that "the precedents upholding flat taxes can no longer support the broad proposition advanced by [Pennsylvania], that every flat tax for the privilege of using a State's highways must be upheld even if it has a discriminatory effect on commerce by reason of that commerce's interstate character." *Id* at 296. The Court, however, was careful to say that:

> Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. [*Id*]

This Court further defined the nature of this exception referring to two earlier decisions. The first was *Aero Mayflower Transit Co v Bd of Railroad Comm'rs*, 332 US 495 (1947) where the Court rejected a claim that a minimum fee of $15 in a fee structure based on gross receipts was unreasonable even though it would result in a tax fifteen times greater than if the standard percentage calculation had been used and stated:

> [The] Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In

> return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operating on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. [*Id* at 506, n 19.]

This Court in *Scheiner* then noted that "[o]ur disposition [in *Aero, supra*] was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana." 483 US at 296, n 26.

The other case cited in *Scheiner* was *Capitol Greyhound Lines v Brice,* 339 US 542 (1950), in which the Court upheld a 2% fee on the fair market value of motor vehicles for the use of state highways because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use." *Scheiner,* 483 US at 296, n 26, quoting 339 US at 546. Thus, a more finely tuned apportionment would be unworkable given the myriad of factors needed to effect a fair apportionment.

Thus, this Court's holding in *Scheiner* plainly does not require the invalidation of all flat taxes. Instead, when administrative realities prevent the use of more precise levies, unapportioned flat taxes are permitted under the Commerce Clause.

(a) The intrastate fee fits the *Scheiner* exception since no data system is available to fairly apportion the fee and to devise and implement one would pose genuine administrative burdens.

The intrastate fee fits the *Scheiner* exception since the use of a more finely gradated user-fee schedule poses genuine administrative burdens and the fee under MCL 478.2(1) is the only practicable means of collecting revenues. This was pointed out in the second supplemental affidavit of Thomas R. Lonergan, the MPSC's Director of the Motor Carrier Division, when he said:

> Plaintiffs suggest that the $100 per vehicle fee [478.2(1)] must be apportioned in some manner, such as mileage, but there is no data accumulation system available which could be used to separate miles traveled intrastate versus interstate. MCL 478.2(1) is based on transportation of intrastate shipments, and although the IRP [International Registration Plan] requires motor carriers to declare in advance the number of miles traveled by each vehicle in each state, there is no declaration of intrastate miles charged. Therefore, the IRP system could not be used for mileage data of intrastate operations.
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> To devise a system based upon mileage would require accumulated data as to the number of intrastate shipments, the weight of such shipments, etc. to reach a reasonable apportionment of interstate versus intrastate revenue. This would make telephone service separations look simple. Both the motor carriers and the State of Michigan would need to devise complex systems for determining fee liability, billing, auditing and so forth. This approach appears to be administratively inefficient for the amount of fee revenue collected per year, approximately $3.5 million involving 3,000 motor carriers. [J.A. 64.]

As Mr. Lonergan states, there is no data accumulation system available that would permit the fair apportionment of the intrastate fee. Moreover, Mr. Lonergan says that to fairly apportion the intrastate fee, various other factors would need to be considered. Mr. Lonergan's statement thus establishes that apportionment of the intrastate fee would be impracticable, and would pose genuine administrative burdens in attempting to devise and collect the necessary data to allow for a fair apportionment.

(b) The use of a more finely gradated fee is impracticable in light of the amount of the fee involved.

Implicit in both *Aero Mayflower* and *Brice* is a finding that the fees assessed were nominal, particularly in relation to the value being conferred on the taxpayer. When compared to *Aero Mayflower* and *Brice*, the actual charge levied by MCL 478.2(1) is similarly nominal. For example, the $15 fee charged in *Aero Mayflower* in 1947 is equal to $123.63 in 2003 using the Consumer Price Index.[4]

The nominal "burden" imposed by the $100 fee in MCL 478.2(1) may be even further reduced, as the statute provides for two further reductions of the amount. First, MCL 478.2(1) provides that a motor carrier is to pay a fee of $50 per vehicle if the carrier begins intrastate operations after June 30. Second, MCL 478.2(3) further authorizes the MPSC to issue a temporary 72-hour permit to a certificated motor carrier at a fee of $10. As Respondents noted to the trial court below:

> [A] motor carrier that is only involved in occasional or incidental intrastate commerce would not have to pay $100 per vehicle pursuant to MCL 478.2(1). When an intrastate opportunity arises a motor carrier can obtain a $10.00 temporary permit. A motor carrier could operate for up to 30 days using the 10 cards before reaching the equivalent of the $100 decal fee. [See, Second Supplemental Affidavit of Thomas L. Lonergan, J.A. 63-64.]

[4] In 2003, $15.00 from 1947 is worth $123.63 using the CPI index; $102.17 using the GDP deflator; $221.86 using the unskilled wage; $334.73 using the GDP per capita; and, $674.69 using the relative share of GDP. See, Economic History Services, <http://www.eh.net.> (accessed March 24, 2005)

Thus, even if the intrastate fee under MCL 478.2(1) is considered to be a tax, it does not violate the Commerce Clause because it falls within the exception set forth in *Scheiner*.

B. The Intrastate Fee is fairly apportioned.

ATA claims that the intrastate does not satisfy the second prong of the *Complete Auto* test, i.e., that it is not fairly apportioned. Since 1983, this Court has used the principle of "internal consistency" when determining whether a state tax is fairly apportioned under the Commerce Clause.

In *Container Corp of America v Franchise Tax Bd*, 463 US 159, 169 (1983), this Court first suggested that a state tax, in order to be valid under the Commerce Clause, must have "what might be called internal consistency – that is, the [tax] must be such that, if applied by every jurisdiction, it would result in no more than all of the business' income being taxed." In *Armco, Inc v Hardy*, 467 US 638 (1984), the Court again applied the internal consistency test, striking down a West Virginia business and operation tax. The Court held that because the interstate manufacturer was subjected to a multiple tax burden that was not placed on an intrastate manufacturer the tax created an "impermissible interference with free trade." *Id* at 644. In 1987, again using the internal consistency test, the Court struck down a similar business and operations tax in *Tyler Pipe Industries v Washington Dep't of Revenue*, 483 US 232 (1987). On the same day the Court issued its decision in *Tyler Pipe*, it used the internal consistency test in *American Trucking Ass'ns, Inc v Scheiner, supra*, to strike down two Pennsylvania highway use taxes.

The Court's most recent description of the internal consistency test was in *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175 (1995), which reviewed Oklahoma's state sales tax on bus tickets sold in Oklahoma for interstate travel. Jefferson Lines, a Minnesota corporation, provided bus services as a common carrier in Oklahoma without remitting the 4% sales tax for tickets it had sold in Oklahoma for bus travel from Oklahoma to other states, although it did collect and remit the

taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that state. Since Jefferson Lines did not challenge the tax on intrastate operations, this Court reviewed the interstate portion of the tax under the four-pronged test of *Complete Auto*. Applying the internal consistency test to Oklahoma's sales tax on bus tickets sold in Oklahoma for interstate travel originating there, this Court, 514 US at 185, said:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

ATA argues that the internal consistency test, as applied in *Scheiner*, requires the invalidation of Michigan's intrastate fee. ATA contends that interstate carriers that transport one load between two points in Michigan, as part of their overall operations are unconstitutionally subject to the full $100 intrastate fee. They contend that in the course of an interstate haul, a truck that is passing through Michigan cannot 'top off' its load by transporting an additional load between two points in Michigan unless it has paid the $100 fee. According to the ATA, because the intrastate fee authorized by MCL 478.2(1) is a flat, non-apportioned fee it fails to satisfy the internal consistency test.

It should first be noted that the intrastate fee does not resemble the fees in *Scheiner*. While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's intrastate fee relates solely to those vehicles assigned by the carrier to haul intrastate loads within Michigan. Vehicles hauling only interstate loads do not pay a fee under MCL 478.2(1). Michigan's regulatory statutes and fees do not relate to or adversely affect the Federal Highway

Administration (FHA) interstate authority. Thus, unlike *Scheiner*, where a vehicle operating in interstate commerce could be subject to multiple axle taxes (if all States enacted them), regardless of how little travel was made in a State, a fee like Michigan's cannot result in multiple fees for interstate transportation. Thus, no multiple fees can result. If the carrier elects to conduct intrastate transportation in multiple States, then it may be subject to additional State fees. But, such a hypothetical was not addressed in *Scheiner*.

ATA then concludes that flat taxes, such as the intrastate fee, must necessarily fail the internal consistency test for two reasons. (ATA Brief, p 13.) First, it is argued that such a tax results in multiple taxation and second that interstate commerce is discriminated against because it imposes a higher effective per-mile rate on interstate trucks than on trucks that confine their operating to the taxing state. *Id.*

ATA's analysis, however, effectively eliminates the distinction between interstate commerce and intrastate commerce. The express wording of the Commerce Clause seeks to ensure that there is free trade "among the several States." Thus, the answer to the threshold question of whether the intrastate fee hinders the maintenance of a free trade area among the several States is that there is no basis, other than ATA's hypothetical and unproven claims, to prove that it does.

1. If a multiple tax burden may be said to exist, it is not one that offends the Commerce Clause in that it is limited to discrete intrastate transactions.

ATA argues that the intrastate fee is not internally consistent because if all 48 contiguous States were to impose a flat $100 fee on an interstate truck when conducting intrastate operations in each State it would result in a cumulative, or multiple tax burden of $4,800. Quoting this Court's decision in *Scheiner*, 483 US at 285, n 20, ATA (Brief, pp 14-15) claims that flat levies like the Michigan fee "bear much more heavily in the aggregate on a firm

that sells in many places than on a firm otherwise identical ... that sells in only one place." The foregoing quote from *Scheiner*, however, was made with respect to Pennsylvania fees that were different from the Michigan fee here. The Pennsylvania fees applied to all vehicles traveling its highways regardless of whether they were engaged in interstate or intrastate operations. In other words, the Pennsylvania fees plainly constituted an entry fee to engage in interstate commerce on Pennsylvania's highways. That is not the case here since a motor carrier's truck may use Michigan highways to conduct interstate operations without being subject to the fee under MCL 478.2(1). Thus, the fee imposed by MCL 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan. This presents no danger of multiple taxation of those hauls since only the Michigan intrastate transportation, that cannot occur in any other State is being assessed. Moreover, the intrastate fee is internally consistent in that it does not constitute a tax of the business' unitary income. Where a "tax is assessed not on unitary income, but on discrete events, such as sale, manufacture and delivery, which can only occur in a single State or in different States that apportionment principle is not applicable; there is simply no unitary figure or event to apportion." *Tyler Pipe, supra,* 483 US at 256 (Scalia, J., dissenting.)

A line of this Court's cases support this contention since they subjected flat taxes on a transportation companies' intrastate routes to a more relaxed scrutiny than on their interstate routes. In *Osborne v Florida, supra,* 164 US at 654, the Court upheld a flat license tax that was applied to and affected only that portion of the business that was done in the state and was local in character. In upholding the tax, this Court stated:

> So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute.
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> * * *

> The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax.
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> Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State. [164 US at 655.]

This holding is in harmony with the distinction between the fees invalidated in *Scheiner* and the intrastate fee under MCL 478.2(1). The fees charged in *Scheiner* made no distinction between interstate and intrastate hauls and a motor carrier could not conduct any interstate business in Pennsylvania without first paying the fees. Like *Osborne,* but unlike *Scheiner,* the intrastate fee relates solely to intrastate activity.

The holding in *Osborne* was subsequently followed in a number of other cases decided by this Court. In *Pullman Co v Adams,* 189 US 420 (1903), the Court upheld a Mississippi partially - flat tax against a company that operated railroad sleeping cars that carried both interstate and intrastate passengers in the same cars. Mr. Justice Holmes, speaking for a unanimous court noted that, "the company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." *Id* at 422. Similarly, flat taxes were upheld in *Bode v Barrett,* 344 US 583, 585 (1953) and *City of Chicago v Willet Co,* 344 US 574, 580 (1953).

2. The practical consequences claimed by ATA are hypothetical and have not been proven.

ATA argues this *Osborne* line of cases has no place under this Court's current approach that looks to the practical consequences of the tax or fee. It is wrong, however, to assert that the logic in *Osborne* is no longer employed under the Court's modern decisions. For example, in *Commonwealth Edison v Montana,* 453 US 609, 617 (1980), this Court upheld a 30% severance tax Montana levied on each ton of coal mined in that State, rejecting the notion that there was multiple taxation, saying:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the State Court observed, "the severance can occur in no other state" and no other state can tax the severance.

Similarly, the intrastate shipment in this case can only occur in Michigan and Michigan alone can assess a fee for that shipment.

The *Osborne* cases should not be swept aside because they correctly note that there are valid distinctions between interstate and intrastate commerce, particularly with respect for the State's right to regulate legitimate local concerns pursuant to its police powers. Under ATA's approach, intrastate commerce ceases once an interstate business wishes to conduct a local, intrastate transaction. The existence of intrastate commerce then becomes dependent upon the identity of the regulated company and whether it is from out-of-State, rather than the nature of the activity that is occurring. The practical consequence of ATA's approach is that the state boundaries are no longer irrelevant. This is because of the identity of the person being regulated is being used to determine whether an activity (that is otherwise entirely local in character and does not cross state boundaries) affects interstate commerce. Such an approach is every bit as formulistic, as earlier approaches, such as *Spector Motor Service v O'Connor,* 340 US 602 (1951) that have been rejected by this Court.

Lastly, the practical consequences, as claimed by ATA, are speculative since the record does not establish either the existence or the extent of any competitive disadvantage or actual burden being placed on interstate commerce by MCL 478.2(1). ATA, however, citing earlier court decisions, argues that there is "no need for an empirical demonstration that a flat tax discourages interstate commerce." (ATA Brief, p 28.) The Respondents respectfully disagree.

3. A finding of internal inconsistency of a tax that is not facially discriminatory should be based on the application of concrete facts.

ATA argues that there is no need for an empirical demonstration that the flat tax discourages interstate commerce. (ATA Brief, p 28.) ATA's assertion in response to the brief by the United States supporting the grant of certiorari. (ATA Brief, p 29, n 13.) The United States suggested remanding the case for the Michigan Court of Appeals to develop a record on whether Michigan's fee scheme affects out-of-state carriers disproportionately.[5]

ATA cites *Bacchus Imports; Chemical Waste Mgmt, Inc v Hunt,* 504 US 334 (1992); *Oregon Waste Sys; Fulton Corp v Faulkner,* 516 US 325 (1996); *Camps Newfound/Owatonna v Town of Harrison,* 520 US 564 (1997); and *Jefferson Lines, supra,* for the proposition that no evidence or extent of discrimination must be demonstrated where a state tax discriminates. But the fees or taxes that were the subject of these cases were not like Michigan's intrastate fee. Unlike Michigan's fee, they did not provide a mechanism that ameliorates any potential discriminatory affect on interstate commerce. Under the Michigan fee structure a Michigan certificated motor carrier that wants to top off a load or conduct an intrastate haul can do so and

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[5] Respondents, as noted in their supplemental brief, oppose giving ATA an opportunity to develop a factual record on remand. ATA chose not to support their claims with facts when required to do so under the Michigan Court Rules. Summary disposition, was therefore properly entered against ATA.

pay only a $10 fee rather than the $100 decal fee. None of the fees or taxes that were the subject of the cases cited above had such a feature.

Michigan's fee is unlike the fees addressed in these cases because the Michigan fee targets intrastate activity. In the cases cited above, the invalidated taxes and fees were pointedly directed at interstate commerce. In *Bacchus,* certain alcoholic beverages produced in Hawaii enjoyed a tax preference over alcoholic beverages produced in other States. In *Chemical Waste* and *Oregon Waste* Alabama and Oregon subjected waste generated outside of their States to higher fees than waste generated within their States. In *Fulton* it was a credit for intangibles tax that was based on the amount of the corporation's income that was subject to North Carolina corporate income tax. North Carolina residents paid intangibles tax on the value of corporate stock that they owned. The more activity the corporation conducted in North Carolina the larger the tax credit. Again a clear burden on interstate commerce.

Only in *Scheiner* did Pennsylvania provide a temporary pass in lieu of the axle fee, one of the taxes at issue in *Scheiner.* But Pennsylvania did not provide any such relief from the $25 I.D. marker fee, which is more similar to Michigan intrastate fee. The Court did not discuss whether Pennsylvania's five day pass in lieu of the axle fee provided constitutional relief in *Scheiner.* Michigan's intrastate fee is different since it regulates intrastate activity. Moreover, by providing an alternative $10 fee, Michigan allows a carrier that only infrequently makes intrastate deliveries an alternative to the annual $100 fee. This is not equivalent to a fee based on mileage in Michigan as ATA seems to insist is necessary. But the $10 fee does limit a carrier's burden based on the frequency of intrastate deliveries.

There is no empirical demonstration that the alternative $10 fee does not provide relief to interstate carriers that may wish to occasionally top-off an interstate delivery with an intrastate delivery. Absent an empirical demonstration that $100 fee in

tandem with the $10 fee burdens interstate commerce, the intrastate fee should not be invalidated. ATA would have the Court invalidate the fee simply because it is $100 annual charge, not apportioned by mileage. ATA does not acknowledge that opportunity to pay the $10 fee in lieu of the annual fee provides a constitutional circuit breaker. This is a flat fee that is not based on highway usage. Nonetheless, it also provides an alternative for the occasional intrastate haul.

ATA asks the Court to invalidate Michigan's fee structure because it contains an annual $100 fee. This Court, however, looks to the entire statute when interpreting the effect of a particular provision. See e.g., *Bennett v Spear,* 520 US 154, 174 (1997). Thus, the Court should examine the entire structure of the fee, and not as ATA urges, strike down the statute without a demonstration that there is, in fact, discrimination.

ATA stakes out an untenable position. ATA would have every State fee fall if an interstate actor paid the fee. The United States correctly noted that the record did not establish that the fee did indeed burden interstate commerce. Before striking Michigan's intrastate fee, or any other State fee, this Court should ensure that the State has truly transgressed. Michigan requires an annual payment of $100 for the privilege of making intrastate deliveries. A motor fuel tax, for instance, would not be limited to intrastate transactions but would also fall on those operating solely in interstate commerce. There has been no showing that there is another practical method for assessing a fee on intrastate deliveries.

As to the practical consequences, the Respondents maintain that the better view is a tax is internally inconsistent only if the structure of the tax has been shown to burden interstate commerce through the introduction of concrete facts. Hypothetical "facts" should not form the basis for a determination that a regulatory fee that does not discriminate on its face lacks internal consistency. Indeed, as the Minnesota Supreme Court noted in *In re: Alternative Minimum Tax Refund Cases,* 546 NW2d 285, 290

(1996), this Court "has never found a violation of internal consistency by relying on the existence of a purely hypothetical taxpayer with a specific structure of factors and taxable income, to justify striking down a law that was not facially discriminatory."

ATA's citation to *Nippert,* 327 US at 431, is puzzling given that the transaction there was later characterized by this Court as being "essentially interstate" (*Dunbar-Stanley Studies, Inc v Alabama*, 393 US 537, 540 (1969). Moreover, in *Nippert,* 327 US at 431, this Court plainly indicated the critical importance of concrete facts when determining the practical consequences of a tax:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. *Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences.* In that *blindness* lies the vice of the tax and of appellees position. [footnote omitted; emphasis added.]

ATA, however, seeks to have this Court implement a review that incorporates a "blindness" to "concrete facts" when determining whether a state fee or tax is reviewed under the Commerce Clause.

Finally, ATA's approach would result in a disparity in the degree of evidence necessary to prove a burden on interstate commerce under the separate Commerce Clause tests employed by this Court. Under the *Pike v Bruce Church* test, used to analyze state regulations, no undue burden will be found where the burden is only incidental where the State regulates

evenhandedly. Under the *Complete Auto* test, used to analyze taxes and as interpreted by ATA, there is no corresponding level of "incidental burden" on interstate commerce that is allowed. Under ATA's zero-tolerance approach, only the State tax structure is analyzed and if a hypothetical construct can be advanced that yields the *potential* of multiple taxation, the tax is deemed to violate the Commerce Clause without regard to practical, or actual consequences, that are based on facts. It is no answer to say that the *Scheiner* exception is equivalent to an incidental burden because the burden in *Scheiner* is not related so much to the burden it places on interstate commerce as it is to the administrative burden it places on the State. The level of proof necessary to an "incidental burden" under either the *Pike* or *Complete Auto* test should be roughly similar. The approach advocated by ATA, however, results in an unwarranted and unwise disparity. Simply put, the problem with the approach argued by ATA is that it sacrifices a State's ability to regulate and to defray the costs of that regulation, over matters that pose legitimate local concern for vague and unproven benefits to interstate commerce.

4. ATA's argument, if accepted, would jeopardize any unapportioned flat state or local fee or tax.

The approach advocated by ATA could have a profound impact on existing state taxing structures, as *any* unapportioned flat state or local tax would necessarily fail under the internal consistency test.

As one commentator has noted "[t]he implications of this conclusion are rather unsettling," since several broad categories of state exactions would be in jeopardy, including: state fees and taxes on domestic and foreign corporations when first organizing or qualifying to do business in the state; annual business license taxes for carrying on trades and occupations; and professional and similar license fees. See Hellerstein, *Is 'Internal Consistency' Foolish?; Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH L REV 138, 154-155 (1988). Moreover, it is difficult to imagine how such fees could

ever be fairly apportioned. Would a fishing license to an out-of-state angler need to be apportioned based on the number or the size of fish caught? Or should State bar dues for an out-of-state attorney be apportioned according to the amount of revenue earned in the State? There is no need to embark upon the journey that ATA would have this Court take, since all such local, intrastate activities are properly subject to the State's police powers to regulate. Similarly, the State should be able to assess fees covering such intrastate activities to help defray the costs of regulation to protect the health, safety and welfare of its citizens.

C. The Michigan Court of Appeals correctly analyzed the intrastate fee under the Commerce Clause in accordance with this Court's decisions.

The Michigan Court of Appeals correctly concluded that *Scheiner* was not applicable to the intrastate fee since the test used in *Scheiner* and *Complete Auto* applies to taxes and not regulatory fees. ATA derides this decision as a "manifest evasion of this Court's precedents." (ATA Brief, p 22.) Moreover, ATA portrays the Michigan court's decision as if it were the only decision to hold that a regulatory fee, enacted pursuant to police powers to protect safety, health and welfare of the citizenry, should be distinguished from a tax. ATA fails to discuss similar holdings from the U.S. Courts of Appeals for the Sixth and Tenth Circuits and the Supreme Court of Washington. The distinction between a fee and a tax, as employed by the Michigan Court of Appeals in its Commerce Clause analysis, is constitutionally valid and is consistent with the decisions of this Court.

1. Other decisions distinguish regulatory fees from taxes under the Commerce Clause.

The U.S. Courts of Appeals for the Sixth and Tenth Circuits have distinguished a fee from a tax when determining its validity under the Commerce Clause. In *Interstate Towing Ass'n v City of Cincinnati,* 6 F3d 1154 (6th Cir, 1993), the Sixth Circuit upheld a Cincinnati ordinance that required the licensing of all tow trucks that tow vehicles from locations within the city limits to other city

locations, or to locations outside the city. The plaintiff association, citing this Court's decision in *Scheiner,* claimed the ordinance impermissibly burdened interstate commerce, arguing that it facially discriminated against Indiana and Kentucky towing companies, because they allegedly bore an unequal burden of the fees paid. The Sixth Circuit, citing *Maine v Taylor,* 477 US 131, 138 (1986), held that since the ordinance did not on its face "affirmatively discriminate" against interstate transactions, it did not automatically trigger heightened judicial scrutiny. 6 F3d at 1162.

The Sixth Circuit held that *Scheiner* was clearly distinguishable since the City's $80 fee could not properly be characterized as a user fee, as was the tax in *Scheiner*. 6 F3d at 1162. The Sixth Circuit found the City's fee to be different because it was assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety. *Id.* In short, the Cincinnati fee was not charged for the privilege of using the City's streets, nor are City- or Ohio-based tow trucks exempt from the fee. Thus, State boundaries were "entirely irrelevant" to the fee. *Id.*

The Sixth Circuit rejected the contention that the fee resulted in a higher "per mile" cost to out-of-state towing companies, saying:

> While the burden of the fee is indeed less, as a percentage of revenue, for those firms that do more business in Cincinnati, this has nothing to do with the towing company's home *state*. And the fact that some of the firms on which the fee may fall more heavily, due to infrequent trips to the City, are based across state borders does not render the fee impermissible.
>
> The City deems safety, minimum levels of service, and consumer protection necessary for the provision of towing

services within its borders. Such concerns have consistently been regarded as legitimate, innately local in nature, and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce. [6 F3d at 1162-1163 (footnote omitted; citation omitted; emphasis in original).]

The Sixth Circuit also rejected the plaintiff association's claim that the Cincinnati Ordinance unduly burdened interstate commerce, because it failed the internal consistency test, saying:

Ours is not a case, however, in which the City has imposed a tax only "for the privilege of making commercial entrances into its territory," *id.* at 284, 107 S Ct at 2840, but one where the City is simply trying to regulate what it reasonably thinks is a potentially dangerous or troublesome activity carried on within its borders. As we have discussed, towing services are essentially local in nature, and give rise to legitimate local concerns about safety, consumer protection, and the like. And again, just because Cincinnati, or any other municipality, happens to be located on a state border does not alter this essential character of towing, transforming an otherwise local service into "interstate motor carriage" and rendering the otherwise neutrally applicable provisions of the Ordinance "impermissible burdens" on interstate commerce.

* * *

In the final analysis, this sort of regulation--local business regulation that applies to those within the city in precisely the same way as it does to those without--is properly overseen by the local political process, not the Commerce Clause. [6 F3d at 1165-1166 (footnotes omitted).]

Similarly, the Tenth Circuit in *V-1 Oil Co v Utah,* 131 F3d 1415 (10th Cir, 1997), upheld a Utah act that provided that a person could not sell, transport, dispense or store liquefied petroleum gas (LPG) without first obtaining a state license and

paying licensing and certification fees. The Tenth Circuit applied Utah law and determined that the charges were regulatory fees as opposed to taxes since they were used "to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the state of Utah meet minimum standards of safety." *Id* at 1423. The Tenth Circuit then upheld the license fees using the three-factor test set forth in *Pike. Id.*

The Supreme Court of Washington in *Franks and Sons v Washington,* 966 P2d 1232 (1998) upheld a gross weight regulatory fee that was used to fund a motor carrier safety program. Citing *Scheiner,* the plaintiff claimed that the fee was effectively a tax that was not internally consistent and violated the Commerce Clause. The Washington Court disagreed, saying that a regulatory fee is different from a tax:

This dichotomy is more than semantics because, where regulatory fees have been found not discriminatory, apportionment, and therefore the internal consistency test, has not been at issue in the majority of cases. [*Id* at 1238.]

That Court then noted that the differences between a tax, which is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power.[6] Moreover, revenues from a fee are used exclusively for the purpose of financing regulation whereas revenues from a tax may be used for other purposes. The Washington Court then cited *Union Pac RR Co v*

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[6] This Court in *Commonwealth Edison v Montana, supra,* 453 US at 622, n 12, similarly noted that there is a difference between taxes and fees, saying:

As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged to not appear to be manifestly disproportionate to the services rendered...."

Public Util Comm, 899 F2d 854 (9th Cir, 1990), in which the Ninth Circuit held a similar regulatory fee imposed by Oregon was not a tax and therefore fell outside the scope of the prohibition in the Railroad Revitalization and Regulatory Reform Act (4-R Act) on state taxes that discriminate against rail carriers. The Court in *Franks and Sons*, 966 P2d at 1238-1230, then quoted with approval the Ninth Circuit's statement that:

> The concerns underlying the constitutional limitations imposed on the taxing power by article I, section 8 are relevant to measures having the primary objective of raising revenues for the general support of government, but not to measures having the primary objective of regulating commerce. Thus, a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of article I, section 8 apply. *Union Pac RR Co,* 899 F2d at 859 (citations omitted).

Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services. See, e.g., *National Cable Television Ass'n v United States,* 415 US 336, 340-341 (1974). A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *Franks and Sons,* 966 P2d at 1239.

The Washington Court declined to apply the *Complete Auto* test saying that there were policy reasons that the apportionment rationale should not be extended to nondiscriminatory regulatory fees. In particular, the Washington Court noted that if regulatory fees must be apportioned, then a whole host of local fees, designed to offset legitimate costs of regulation could be at risk. *Id* at 1240-1241. Based on its analysis, the Washington Supreme Court then utilized the three-factor test set forth in *Pike* and concluded the fee regulated evenhandedly with only incidental effects on interstate commerce, served a legitimate local purpose and could not be accomplished through alternative means.

2. The Michigan Court of Appeals' decision correctly balanced the State's police power with the Commerce Clause.

The Michigan Court of Appeals, like the Washington Supreme Court in *Franks and Sons,* examined the burden the fee imposes on interstate commerce and evaluated that burden according to this Court's decision in *Pike,* 397 US at 142 (1970) that stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co v. Detroit,* 362 U.S. 440, 443; 4 L. Ed. 2d 852, 856; 80 S. Ct. 813; 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with less impact on interstate activities.

This balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

MCL 478.2(1) constitutes a valid exercise of the state's police power. This was aptly noted by the trial court below:

> The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate commerce comply with MCL safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not leave a prejudicial effect on interstate commerce

and thus does not impact the Commerce Clause. [03-1234, Petition, Appx. 49.]

This Court has declared that the Commerce Clause does not withhold from the States the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis v BT Investment Managers, Inc,* 447 US 27, 35-36 (1980), the Court stated that the Commerce Clause "limitation upon state power . . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

As the Michigan Court of Appeals noted, the Petitioners, "do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations." J.A. 101. Even though a statute enacted under the police powers of the state may affect interstate commerce, it does not translate into a burden on such commerce. For example, in *Huron-Portland Cement Co v Detroit,* 362 US 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce that were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." 362 US at 447. The Court concluded that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (362 US at 448.)

The application of the *Complete Auto* test to the intrastate fee under MCL 478.2(1) ignores this valid exercise by the State to protect the welfare and safety of its citizens. Moreover, it does so

without any balancing of the interests involved. As such, it results in a disparity in the degree of scrutiny to be applied to a state statute that seeks to regulate to protect a state's citizenry. If a regulation that does not assess a fee is challenged under the Commerce Clause that state regulation may be subject to a balancing test whereby a factual analysis is undertaken to determine the level of the burden on interstate commerce. Should the same statute, however, impose a fee to defray the costs of regulation, it then becomes subject to an analysis of the "structure" of the fee where the person challenging the regulatory statute may prove, through hypothetical "facts" alone, that the burden on interstate commerce is undue.

Finally, the Respondents disagree with ATA's argument that *Scheiner* requires the apportionment of the intrastate fee. In *Scheiner*, the fees that were charged were used to fund general highway maintenance and repairs. Here the fees are used to underwrite the costs of various safety measures such motor carrier education, etc. This Court has not specifically determined whether an unapportioned fee used exclusively to fund regulatory safety activities should be reviewed under the same standard. Furthermore, while mileage may be an appropriate yardstick to use to reimburse a State for the use of its highways that does not necessarily hold true for reimbursing a State for its safety activities. Police departments routinely perform safety related functions yet those who benefit by those services are generally not taxed or assessed according to the frequency or magnitude of their use. Thus, the Michigan Court of Appeals correctly analyzed the intrastate fee as a regulatory fee subject to a Commerce Clause under the test in *Pike*.

II. The Michigan statute that charges a $100 annual fee for each motor carrier vehicle that has a Michigan license plate and is operating in interstate commerce is not preempted by 49 USC 14504.

Section 14504 was enacted by Congress as part of the Intermodal Surface Transportation Efficiency Act of 1991, to simplify the process of interstate motor carriers registering their

Interstate Commerce Commission (ICC) with the States. As this Court noted in *Yellow Transportation v Michigan,* 537 US 36, 40 (2002), "[u]nder the new system, called the Single State Registration System [SSRS] 'a motor carrier [would be] required to register annually with only one State', and 'such single State registration [would] be deemed to satisfy the registration requirements of all other States.'" The SSRS imposed a $10 cap on the per-vehicle registration fee that participating States could charge interstate motor carriers. Michigan is a participating State and charges registration fees authorized by the SSRS under MCL 478.7.

MCL 478.2(2) is part of a comprehensive regulatory scheme regulating motor carriers and charges a $100 annual fee for each motor carrier vehicle having a Michigan license plate and operating in interstate commerce. As noted in the Statement, revenues from the $100 fee are used by the State to defray the costs of regulatory safety enforcement.

Mid-Con's principal argument is that in Section 14504 Congress preempted the States from assessing interstate motor carriers any vehicle fees in excess of the $10 SSRS registration fee (Mid-Con Brief, p 23.) The United States supports Mid-Con and argues that MCL 478.2(2) is preempted by Section 14504 because it singles out interstate carriers for the charging of a fee based on the interstate character of their operations.

There is no preemption in this case. Neither the text of Section 14504 nor the Congressional purpose behind it support the expansive reading urged by Mid-Con. Moreover, it is clear from a review of the Michigan Motor Carrier Act as well as the MPSC's administration of that act that the charging of the fee to interstate carriers under MCL 478.2(2) is not based solely on their interstate operations.

A. Section 14504 does not preempt a state law enacted under the State's police powers unless that was the clear and manifest purpose of Congress.

This Court, in *New York Blue Cross v Travelers Ins,* 514 US 645, 654-655 (1995), summarized the scope of federal preemption analysis as follows:

> Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. . . . And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations omitted.]

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369 (1986). Furthermore, as this Court noted in *Cipollone v Ligget Group, Inc,* 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained." *Florida Lime and Avocado Growers v Paul,* 373 US 132, 142 (1963). An expressed intent to nullify a state regulatory program will not be lightly inferred. *Cf. Pacific Gas & Electric*

Co v California Energy Resources Conservation and Development Comm, 461 US 190 (1983). This is particularly so where, as here, the police power of the state is implicated. In *City of Columbus, et al v Ours Garage and Wrecker Service, Inc,* 536 US 424, 444 (2002), this Court observed:

> Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks and citation omitted). Section 14501(c)(2)(A) seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid.* (internal quotation marks and citation omitted).

City of Columbus involved federal preemption of any state action in the area of scheduling and rates for motor carriers of passengers, and the explicit exception to that preemption found at Section 14501(c)(2), preserving to the States the authority to regulate in matters of safety. The same preemption analysis employed in *City of Columbus* applies to the instant case. Congress has not, in Section 14504, expressed a clear and manifest intent to supplant the State's historic police power in the area of motor carrier safety with the limited registration requirements contained in Section 14504.

B. Section 14504 does not manifest an intent to preempt state laws having a separate and distinct purpose unrelated to the registration of an interstate carrier's ICC authority with the states.

1. The text of Section 14504, by its own terms, concerns the registration of a motor carrier's federal authority with the States.

With the SSRS, Congress eliminated the burdens associated with the multiple State registrations of an interstate carrier's

federal authority, and also established a fee system to minimize the cost of filing a proof of insurance. The specific requirements of the SSRS are set forth in Section 14504(c)(2) as follows:

> (A) **Evidence of certificate; proof of insurance; payment of fees.** – Under the amended standards implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –
>
> (i) to file and maintain evidence of such certificate or permit;
>
> (ii) to file satisfactory proof of required insurance or qualification as a self-insurer;
>
> (iii)to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and
>
> (iv)to file the name of a local agent for service of process.
>
> (B) **Receipts; fee system.** – such amended standards –
>
> * * *
>
> (iv)shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

The scope of the standards authorized by Section 14504 relates only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. Section 14504 seeks only to provide the motor carrier with the benefit of registering their ICC authority in one state, for each of the states for which they intend to operate.

Thus, while Congress did, with the enactment of the SSRS, preempt a State from charging more than $10 for filing proof of insurance to operate within the borders of that State, it did not concurrently preempt the State from charging other fees to those interstate vehicles that are licensed in that State. Indeed, the United States recognizes that, notwithstanding the SSRS, States remain free to levy a variety of other fees and taxes (United States Brief, p 16). Thus, the SSRS was not intended, and did not, relieve a motor carrier from paying any and all State fees related to motor carrier vehicles.

2. The legislative history of 49 USC 14504 evidences a Congressional intent to only streamline standards related to the registration of a motor carrier's federal authority with the States.

Section 14504 was amended in 1965 in response to a need to control illegal interstate for-hire trucking. Pub L 89-170, 79 Stat 648 (September 6, 1965). The House noted that such illegal operators represented a "continuing concern" and that despite past legislative activity, "illegal for-hire trucking continues to be a significant problem today." H R Rep No. 253, 89th Cong, 1st Sess, *reprinted in* 1965 USCCAN 2923, 2924. Much of the remedy for this problem was addressed by adoption of additional civil enforcement provisions to be used by the ICC. In addition, there was an acknowledgment that States had attempted to help control the problem by requiring registration of ICC authorized carriers, but there was no uniformity in such State requirements. Hence, uniformity would be required. *Id.* It was specifically noted that the federal standards to be adopted under 49 USC 14504 were "to evidence the lawfulness of interstate operations of a carrier within a State. . . ." *Id* at 2928.

There is no basis for the proposition that state regulatory fees were to be considered "proof of legality of interstate operations." Indeed, it was specifically noted that:

> the purpose of such registration is to enable state enforcement officials to identify motor carriers hauling, on a for-hire basis, commodities subject to regulation and thus take on-the-spot action against those who have not the authority to do so. This, in effect, means that we want to encourage the states in helping the ICC keep unlawful interstate motor carriers off the highway. (111 Cong. Rec. 9672 (May 6, 1965) (statement of Rep. Harris, Chairman, Committee on Interstate and Foreign Commerce.)

Nothing here justifies the argument that Congress intended to deprive the States of their ability to otherwise regulate in the public interest, or to prevent the states from assessing regulatory fees. The Senate was consistent in its characterization of its version of the legislation, noting that the standards defined therein were to "evidence the lawfulness of interstate operations of a carrier," by registration of ICC certificates, proof of insurance and designation of agents for service of process. S Rep No. 387, 89th Cong, Sess, 4-5 (1965) at 4-5. Thus, the need for registration and identification requirements to be uniform was to assist the federal and State governments in addressing the problem of uncertificated, illegal interstate operators, not to eliminate fee-funded State regulatory programs.

C. The interstate fee under MCL 478.2(2) is unrelated to the registration of an interstate carrier's proof of insurance with the States.

MCL 478.2(2) is part of a comprehensive fee system, and provides for a $100 fee for each motor carrier vehicle that is operating entirely in interstate commerce and is license-plated in Michigan:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce.

The regulatory fee provided for in MCL 478.2(2) is not required to prove an interstate carrier is properly certified under federal authority. It is not required to prove that a carrier's motor vehicles are legally registered. It is not required to prove that the carrier is insured, or that it has a named agent for service of process. The interstate fee provides funds that enable Michigan to enforce the Motor Carrier Act; the Motor Carrier Safety Act, MCL 480.11 *et seq*; the Michigan Vehicle Code, MCL 257.1 *et seq*; and the Fire Prevention Act, MCL 29.1 *et seq*. J.A. 24-25, 46-47. In short, it is a fee used to defray the costs of regulation and has nothing to do with proving that an interstate vehicle is properly certified or insured under Section 14504. Thus, MCL 478.2(2) is not within the preemptive scope of Section 14504.

D. MCL 478.2(2) neither conflicts with nor stands as an obstacle to the purposes of the SSRS.

There is no conflict between Section 14504 and MCL 478.2(2). The former provides for a single state registration to prove the lawfulness of transportation by a motor carrier and specifies registration requirements in terms of filing and maintaining ICC certificates, registering motor vehicles, filing proof of insurance and filing the names of registered agents. MCL 478.2(2) does not intrude upon such registration requirements, and does not impose any additional burdens upon motor carriers in terms of proving the lawfulness of its transportation. Rather, MCL 478.2 places a regulatory fee of $100 on each vehicle licensed in Michigan to pay for the administration of the Motor Carrier Act. There simply is no conflict between the state and federal law.

There has been no showing that motor carriers cannot effectively comply with both the federal and state law. While clearly hoping to avoid paying the regulatory fee assessed by

Michigan, there is no record support for the proposition that motor carriers cannot physically comply with both laws. The record would indeed imply just the opposite.

Lastly, MCL 478.2(2) does not obstruct the execution of the objectives underlying the enactment of Section 14504. Motor carriers continue to utilize the SSRS for purposes of registration, and payment of the $100 regulatory fee to Michigan has not proven to jeopardize the continued viability of the SSRS. The implementation of the SSRS and MCL 478.2(2) have not proven to be mutually exclusive, and Section 14504 should not, on such a tenuous and unproven basis be found to preempt the Michigan regulatory fee at issue here.

E. The preemption arguments advanced by Mid-Con and the United States lack merit.

Mid-Con argues that the plain meaning of Section 14504 does four things: (1) restricts State registration of interstate carriers to register with a single base State; (2) prohibits the collection of per-vehicle fees by any State other than the base State; (3) bans vehicle-specific identification and registration; and (4) preempts per vehicle fees in excess of $10 by any participating State (Mid-Con Brief, p 14.) However, the mere fact that such restrictions and limitation exist is not controlling on whether MCL 478.2(2) is preempted. What is controlling is whether, in accordance with Congress' preemptive purpose, those restrictions and limitations apply to the fee charged under MCL 478.2(2). So while the plain meaning of Section 14504 establishes these restrictions and limitation on registration fees under the SSRS, that does not mean they preempt the MCL 478.2(2) fee.

In arguing that Section 14504 preempts Michigan's interstate fee, Mid-Con and the United States take different paths. Mid-Con argues that the Michigan Court of Appeals erred when it determined that there was a presumption against preemption and that its construction is a "classic example of elevating form over substance." (Mid-Con Brief, p 17.) The United States argues that the text of Section 14504(b), the subsection in which Congress

defined its preemptive purpose, establishes preemption of the interstate fee, which it characterizes as "exorbitant."

The argument (Mid-Con Brief, pp 15-16) that Section 14504 pertains to a matter so inherently federal in character that the Michigan Court of Appeals below erred when it stated that there was a "presumption against federal preemption" lacks merit. In an attempt to extricate itself from that presumption, Petitioner Mid-Con cites to *Chicago & North Western Transportation Co v Kalo Brick & Tile Co*, 450 US 311 (1981), in support of the argument that the Interstate Commerce Act represents a comprehensive federal regulatory scheme which permits no presumption against preemption. This Court in *Chicago & North Western* did not, as Mid-Con suggests, simply dismiss the state law as preempted by this "comprehensive regulatory scheme," but rather framed the inquiry in this manner:

> In deciding whether respondent's state-law damages action is pre-empted, we must determine what Congress has said about a carrier's ability to abandon a line, what Iowa state law provides on the same subject, and whether the two are inconsistent. To these tasks we now turn. [450 US at 319.]

This approach is fully consistent with the preemption analysis advanced by Respondents here. Moreover, whether there is a presumption against preemption is not determinative of whether Section 14504 preempts the interstate fee. What controls is the language of the two statutes and, in particular, Congress's purpose in enacting the federal law. In this regard, the United States correctly looks to the text of Section 14504(b) to determine whether the fee charged under MCL 478.2(2) is the type of fee subject to the restrictions and limitations in Section 14504.

As to the argument that regulatory/registration concept is a distinction without a difference, Mid-Con erroneously claims that the MPSC "waives" the "federally compliant $10 fee." (Mid-Con Brief, p 7.) A reading of MCL 478.7(4) plainly discloses that the

MPSC only has the authority to charge the $10 fee to interstate motor carrier vehicles that are not plated in Michigan. The MPSC cannot waive the payment of $10 for Michigan plated vehicles when it has no power to require such a payment in the first place. There is no "registration" fee for Michigan plated vehicles under MCL 478.7. Nor does the SSRS registration form (J.A. 65-67) used by the MPSC transform the $100 fee in MCL 478.2(2) into a registration fee. In fact, the SSRS registration form clearly indicates that vehicles plated in Michigan are not to be listed on the SSRS registration form but are instead to use another form. (P-344-T.) The Michigan Legislature, in prior enactments, has regarded the fees charged under MCL 478.2(2) and 478.2(1) to be regulatory fees, whereas the fee charged under MCL 478.7(4) to be a registration fee. This conclusion is supported by an examination of legislative amendments to the Michigan statutes.

In 1988, the MCA was amended by 1988 PA 347, which raised the annual fee under MCL 478.2 from $50 to $100 and, in MCL 478.7, established for the first time an annual registration fee for interstate carriers licensed in another state for registering the carrier's ICC authority. Later that same year, the Michigan Legislature passed 1988 PA 369. This act added MCL 478.8, that states:

> The increase in the annual fee from $50.00 to $100.00 in section 2 of this article provided by Act No. 347 of the Public Acts of 1988 for a motor carrier licensed in this state and the new registration procedure instituted in section 7 of this article by Act No. 347 of the Public Acts of 1988 shall take effect January 1, 1990.

As the foregoing demonstrates, the Michigan Legislature expressly differentiated between the fee in MCL 478.2 and the "registration procedure" in MCL 478.7.

Contrary to Mid-Con's claim, the decision below does not create a dangerous loophole since the SSRS, the IRP and safety

regulation, along with the fees charged to defray the costs of that regulation, are three separate and distinct areas under the law. As previously noted, the SSRS seeks to reduce the burden of motor carriers registering their ICC operating permits with the States. The intended scope of that enactment is reflected in its language and does not extend to safety regulatory measures. The International Registration Plan (IRP) is defined at 49 USC 31701 as the "interstate agreement" on apportioning vehicle registration fees paid by motor carriers, developed by the American Association of Motor Vehicle Administrators. Similarly, the IRP relates only to registration requirements for the purposes of obtaining license plates. It does not include safety regulations. This is evidenced by Pub L 105-277, Div C, Title I, Oct. 21, 1998, 112 Stat 2681-586 that relates to the registration of trailers (container chassis) and the apportionment of fees for such registration in accordance with the IRP. Subsection (c) notes, however, that:

> (c) SAFETY REGULATION.--This section shall apply to registration requirements only and shall not affect the ability of the State to regulate for safety.

Thus, Congress viewed State safety regulations as being separate from the IRP. MCL 478.2(2) does not create a loophole when it regulates an area not covered by the SSRS or IRP.

Even though the payment of the fee under MCL 478.2(2) has no relationship whatsoever to the carrier's filing of its federal registration with Michigan, the United States argues that it is nonetheless preempted. It arrives at this conclusion by analyzing the two sentences contained in the "General Rule" in Section 14504(b) that states:

> (b) **General rule**.—The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under the subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation

> referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

The United States argues that when these two sentences are read together, State requirements that interstate carriers "must register with the State" are preempted as a general matter if they do not conform to the standards governing the SSRS, regardless of whether or not those state requirements are specifically worded in terms of a carrier's registration of its federal certificate with the State. (United States Brief, p 19.)

This, however, is not what Section 14504(b) says. The first sentence of that subsection says when the State registration is completed under the standards set forth in subsection (c) (i.e. maintaining evidence of certificate, filing satisfactory proof of insurance, etc.) there is no burden. The second sentence says that when a State imposes a registration requirement in excess of the standards in subsection (c), then those registration requirements constitute an unreasonable burden.

The argument by the United States that any State requirement, not just State registration requirements, are preempted proves too much. Within the context of the two sentences themselves, there are no words to indicate that State requirements, not linked to registering a motor carrier's federal certificate, are nonetheless preempted. Indeed, the United States admits as much when it says that there is "no indication that the current Section 14504(b), any more than its predecessor, was intended to preempt state laws and fees in traditional areas of state regulation, such as those governing registration and license plating of trucks under the IRP." (United States Brief, p 19.) But Section 14504(b) does not give the United States the power to pick and choose which State laws and fees in traditional areas of state regulation are deemed preempted and which are not. The regulation and enforcement of safety measures on motor carrier vehicles traveling on Michigan

highways is no less a traditional area of state regulation than the registering and plating of those vehicles.

The claim that Section 14504 preempts MCL 478.2(2) because it imposes distinct burdens on a class of interstate motor vehicles, based on the interstate character of their operations is mistaken. It is clear that the $100 fee is imposed on motor carrier vehicles that are "operating entirely in interstate commerce." It is this language alone, the United States argues, that singles these vehicles out for disparate treatment based on their interstate conduct. But it is also clear that there are other equally important factors that must be taken into consideration.

The fee in MCL 478.2(2) is not required of all interstate motor carrier vehicles. It is expressly limited to those that are Michigan-plated. The fact that MCL 478.2(2) only refers to those Michigan plated vehicles, however, does not mean that Michigan law "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market." See, e.g., *Camps Newfound/Owatonna, Inc,* 520 US at 576. The Court should not ignore the practical effect of MCL 478.2(1) and MCL 478.2(2), and should recognize that when taken together, the two provisions impose a $100 fee on every for-hire vehicle license-plated in Michigan, regardless of the nature of its operations.[7] The United States suggests that the Respondents can neither properly argue nor can the Court properly reject the claim that MCL 478.2(2) is not preempted by the SSRS because it's part of a larger statutory regime that, when considered as a whole, does not discriminate against interstate commerce. (United States Brief, p 26.) The problem with this approach, however, is that this Court looks to the entire statute when interpreting the effect of a particular provision. *Bennett v Spear, supra,* 520 US at 174.

[7] It should be noted that in addition to Michigan-plated vehicles paying a $100 fee, either under MCL 478.2(1) or 478.2(2), other for-hire motor carrier vehicles, not plated in Michigan, that perform intrastate operations will pay the intrastate fee under MCL 478.2(1).

MCL 478.2(2) clearly should be read in conjunction with MCL 478.2(1) which requires a fee similar to that challenged here for motor carriers licensed in Michigan and operating intrastate.[8] When construed together, it is clear that the $100 fee required by the Michigan statutory regime operates as a regulatory fee on all for-hire motor carrier vehicles license-plated in Michigan. Therefore, the effect of MCL 478.2(2) is that a vehicle license-plated in Michigan is not excused from such a regulatory fee just because it is engaged in interstate commerce.

Finally, there is no merit to the United States' claim that the $100 fee in MCL 478.2(2) is exorbitant. Such a claim is only true when and is strictly dependent on whether it's the type of fee preempted by the SSRS. Thus, if it is not subject to preemption, it cannot be classified as an exorbitant fee. Indeed, the IRP, 49 USC 31707, expressly provides that there is no limit on the amount of money a state may charge for registration of a commercial motor vehicle or the amount of any fuel use tax a State may impose. Similarly, this court noted in *Scheiner, supra,* 483 US 271, 282, that registration and plating of a commercial truck can run into the thousands of dollars. Against this backdrop, the $100 amount of the fee in MCL 478.2(2) cannot be classified as exorbitant.[9]

[8] In *United States v Freeman,* 44 US 556; 3 How 556, 564-565; 11 L Ed 724 (1845), this Court observed:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consieration [sic] in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. [Footnote omitted.]

[9] While both Mid-Con and the United States are critical of the amount of the $100 fee in MCL 478.2(2), it should be noted that the decision where to plate and operate a vehicle is dependent on a wide range of economic variables. In this regard, Michigan has a number of economic factors that may significantly reduce the costs to motor carriers, including: increased weight limits (maximum 160,000 pounds allowance), no vehicle property tax, a staggered renewal process, and Michigan no-fault insurance requirements for public liability and property damage.

F. The State court precedents relied upon by Mid-Con do not support the conclusion that Section 14504 preempts MCL 478.2(2).

Mid-Con quotes *State Ex Rel Sammons Trucking, Inc v Boedecker,* 492 P2d 919 (1972) for the proposition that "Congress has pre-empted the field of state regulation and identification of interstate motor vehicles using Montana highways." (Mid-Con Brief, p 18.) This quotation, however, is not only inconsistent with the well-established principle that Congress has not preempted the field of state regulation of interstate motor vehicles, but directly contradicts another case cited in the same section by Mid-Con, i.e., *Roadway Express, Inc v State Treasurer,* 458 NE2d 66, 68 (1983), which held that Congress, in choosing to regulate transportation through the Interstate Commerce Act, did not intend to preempt the field of regulation.

Sammons involved a challenge to certain Montana identification, registration and licensing procedures for motor vehicles. It was argued that these Montana procedures imposed greater and conflicting requirements than the bingo regulations that limited state registration fees to $5.00 per vehicle [since increased to $10.00]. Yet, *Sammons* did not involve any discussion of a *regulatory* fee. The issue addressed there related solely to the state's *registration* fee, which Montana had failed to reduce from $10.00 to $5.00 as required by the new federal regulation. *Sammons* did not address the question of a State's authority to charge per vehicle *regulatory* fees.

Mid-Con also cites to *State Ex Rel Sammons Trucking, Inc v Bollinger,* 544 P2d 1235 (1976). That case reviewed the Montana Legislature's amendment that reduced the $10.00 registration fee to $5.00, so as to comply with federal law. The amendment also redefined "motor vehicle" and made any trailer, semi-trailer or dolly attached to a motor vehicle subject to the $5.00 registration fee. The Montana Supreme Court found this provision conflicted with the federal motor carrier regulations that limited the

definition of motor vehicle to vehicles having a mechanical drive unit. Thus, there was an actual conflict between the federal and State statutes.

Mid-Con's citation to *Roadway Express* similarly misses the mark. *Roadway* held that the Illinois commerce Commission possessed the power to adopt a fee that exceeded the federal limit and was not preempted by Congress from doing so. 458 NE2d at 68. But while the additional fees were legally imposed the Court held they were illegally disbursed because under Illinois law the money was used for purposes other than motor carrier regulation. *Id.* at 70. This is not the case in Michigan inasmuch as the revenues from fees closely match the expeditures for motor carrier regulation. J.A. 28. Thus, Michigan's regulatory fee, under MCL 478.2(2), is not, like its federally-approved $10.00 registration fee, applied to all interstate vehicles in Michigan. This regulatory fee is applied only when actual vehicular "presence" in Michigan is demonstrated, by commercially license plating the fee-paying vehicle in this state. Therefore, the Michigan Court of Appeals correctly recognized that Mid-Con confused the issue, noting that Michigan has complied with the SSRS through MCL 478.7(4) and that MCL 478.2(2) is unrelated to the purpose of the SSRS. J.A. 80, 83-84.

CONCLUSION

In 03-1230, even if the intrastate fee is analyzed as a tax, it is nonetheless constitutionally valid. This is because it falls within the exception set forth in *Scheiner,* that an unapportioned flat tax will not be found to violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated tax would pose genuine administrative burdens.

This Court should reject ATA's attempt to radically expand the scope of this Court's holding in *Scheiner* such that virtually any flat, unapportioned State assessment will constitute a violation of the Commerce Clause. ATA seeks to extend the internal consistency principle, which has been described as

requiring the invalidation of "any unapportioned flat tax on multistate activities" (*Id* at 303-304, Scalia J., dissenting), to include the invalidation of any fee on solely intrastate activities that *may* have an indirect, yet entirely unproven, effect on interstate commerce. Moreover, the questionable, hypothetical benefit to free trade occasioned by the striking down of the intrastate fee would come at the expense of the safety of Michigan's citizens.

ATA derides the distinction employed by the Michigan Court of Appeals between a regulatory fee and a tax under a Commerce Clause analysis, but fails to recognize the important policy considerations involved. Highway safety in the several States is not a one-size-fits-all proposition. The States should be afforded the flexibility to implement a fee-based highway safety program that is responsive to local conditions and concerns. Sacrificing the safety of the public on the States' highways under the banner of free trade unnecessarily frustrates the State's police powers to enact regulations to promote and protect the health, safety and welfare of its citizens. The approach taken by the Michigan Court of Appeals is the better approach in that it balances the legitimate concerns of the States to protect its citizens through the exercise of police powers with ensuring free trade among the States, while requiring actual, rather than hypothetical, facts to support any claim of discrimination.

In 03-1234, this Court should reject the claim that Section 14504 preempts the interstate fee. Neither the text of Section 14504 nor Congressional purpose in enacting the SSRS support the expansive reading that the Mid-Con and the United States attribute to it. The interstate fee is a regulatory fee that does not conflict with or stand as an obstacle to the Congressional objective of simplifying interstate registration requirements. This is made clear by an examination of the Michigan fee system as a whole which demonstrates that the interstate motor carrier vehicle is not singled out for disparate treatment. The Michigan Court of Appeals correctly found that Section 14504 did not preempt MCL 478.2(2).

Should this Court, however, issue an adverse decision against the Respondents in either 03-1230 or 03-1234, the Court should not require the payment of refunds to taxpayers, but should instead remand the case to the Michigan courts to determine how to apply this Court's holding, as it has in other cases where this Court has invalidated a state tax or fee. *See, Tyler Pipe,* 433 US at 251-253; *Bacchus Imports, Ltd,* 468 US at 276-277 (1984); *Williams v Vermont,* 472 US 14, 28 (1985).

The decision of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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Nos. 03-1230 and 03-1234

In The

Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.
AND USF HOLLAND, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

MID-CON FREIGHT SYSTEMS, INC., *et al.*,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Michigan Court Of Appeals

REPLY BRIEF FOR PETITIONERS MID-CON FREIGHT SYSTEMS, INC., *et al.* No. 03-1234

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ARGUMENT

In their brief on the merits, Respondents attempt to shield the $100 Interstate Decal Fee from preemption by way of two recurring themes. First, Respondents focus on the use to which the fee revenues are put and portray Petitioners' claim as an assault on a State safety regulatory program unrelated to the Single State Registration System ("SSRS"). Second, Respondents suggest that the $100 fee is little more than a vehicle registration fee – again untouched by the SSRS – and justified by the Michigan license-plating of vehicles. Neither the use of the fee's revenues nor the Michigan plating of a truck, however, can obscure the fact that Michigan's exaction of the Interstate Decal Fee is a "registration requirement" in excess of the SSRS standards and is therefore preempted by 49 U.S.C. § 14504 ("Section 14504").

A. Michigan Law Imposes A "Registration Requirement" In Excess Of That Permitted By The SSRS, Notwithstanding The Use To Which The Interstate Decal Fee Revenues Are Put

1. At the outset, it should be made plain that this case does *not* involve a challenge to a State safety regulatory program. Rather, this case concerns the federal regulation of matters affecting interstate commerce, and what Petitioners challenge is Michigan's registration of interstate motor carriers in ways that conflict directly with the SSRS standards established by federal law. Under Section 14504, a State requirement that an interstate carrier must "register with the State" is not an unreasonable burden on interstate transportation when the "State registration" is completed under the SSRS standards; however, "[w]hen a State registration requirement imposes obligations in

excess of the standards . . . , the part in excess *is* an unreasonable burden [on interstate transportation]" and is consequently preempted. 49 U.S.C. § 14504(b) (emphasis supplied). Therefore, notwithstanding Michigan's later use of the funds, the operative question presented is whether assessment of the Interstate Decal Fee in the first instance is a prohibited "registration requirement" within the meaning of Section 14504.[1]

There is nothing unique about the use to which Interstate Decal Fee revenues are put. Indeed, Michigan's $10 SSRS fee itself, after first being designated in part to the Michigan Truck Safety Fund under Mich. Comp. Laws § 478.7(5), is combined with all other fee revenue collected by the Michigan Public Service Commission ("PSC") and assigned to the same "regulatory" purposes Respondents so heavily emphasize. J.A. 12; 28. So too, parenthetically, is a portion of Michigan's license-plating fee, but that fee would still be subject to legal challenge if it were not apportioned on a mileage basis because, under the International Registration Plan ("IRP"), plating fees must be apportioned no matter how the fees are used. *See* Mich. Comp. Laws § 257.801(1)(k) (assigning a $15 portion of plating fees to the Michigan Truck Safety Fund). *Compare*

[1] The reason for Respondents' talismanic invocation of a "truck safety" theme is transparent. They hope to obtain the benefit of a presumption against preemption applied when the historic police powers of the States are in question. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (distinguishing regulatory arenas in which there has been a long history of significant federal presence); *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 430 (2002) (applying an assumption that the police powers of the States are not preempted in interpreting an express safety exception to the provisions of 49 U.S.C. § 14501 otherwise preempting State regulation of intrastate motor carrier activities). This case poses no such question.

International Registration Plan, Art. III, § 300 (2004 rev.) (requiring apportionment of each IRP's State's vehicle registration fee) *with* Mich. Comp. Laws § 257.801g(1) (authorizing apportionment of plating fees under the IRP).

This Court long ago dismissed "the aberrational doctrine . . . that state law may frustrate the operation of federal law so long as the state legislature in passing its law had some purpose in mind other than one of frustration." *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971). As the Court explained,

> such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy – other than frustration of the federal objective – that would be tangentially furthered by the proposed state law.

Id. at 652.[2] In short, "[w]hatever the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 107 (1992). The relevant inquiry in this case, therefore, is not whether Michigan's $100 fee is charged "for" a safety regulatory program or even "for" filing proof of insurance within the literal terms of Section 14504. What matters is whether the means,

[2] The Court's analysis refutes as immaterial Respondents' contention that "the Michigan Legislature expressly differentiated" between the "annual" Interstate Decal Fee and the SSRS "registration" fee when it set forth the effective date of statutory amendments in Mich. Comp. Laws § 478.8 (*Respondents' Brief* at 41).

manner, and incidence of the charge comply with what federal law demands.

2. Respondent's brief fails to address the mechanism by which the Interstate Decal Fee is assessed and thus disregards the obvious parallels between the Michigan fee-collection regime and the federal standards for SSRS registration. Those parallels reveal that the Michigan scheme imposes an interstate motor carrier "registration requirement" that mirrors – but conflicts with – the SSRS in four important ways.

First, although the SSRS authorizes State registration of interstate motor carriers, "a motor carrier is required to register annually with only one State," and "such single State registration shall be deemed to satisfy the registration requirements of *all* other States." 49 U.S.C. § 14504(c)(1)(A); (C) (emphasis supplied). Michigan law, however, requires all interstate motor carriers using Michigan-plated vehicles to register with the PSC – *i.e.*, to present and identify themselves on an additional PSC "Equipment List Form" – even if a motor carrier is properly SSRS-registered in another SSRS State.[3]

[3] As previously shown (*Petitioners' Brief* at 15, n.13), an interstate carrier may be SSRS-registered in one State while purchasing its license plates in another because, under 49 C.F.R. § 367.3, the "base" State for SSRS purposes is generally a carrier's *principal* place of business whereas, under the International Registration Plan, Art. II, §§ 210, 218 (2004 rev.), the "base" jurisdiction for IRP plating can be any State in which *a* place of business exists. In addition, an interstate carrier already SSRS-registered in Ohio may use leased motor vehicles that are plated by the lessor/owner in Michigan, in which event the interstate carrier must *also* register with the PSC on its Equipment List Form and pay the $100 fee on each leased vehicle. The Equipment

(Continued on following page)

Second, although the SSRS permits the collection of a per-truck fee in connection with interstate motor carrier registration, "only a State acting in its capacity as a registration State under [the] single State system may require a motor carrier . . . to pay directly to such State fee amounts in accordance with the fee system established [by Section 14504], subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system." 49 U.S.C. § 14504(c)(2)(A)(iii). Michigan, however, whether acting in its capacity as an SSRS registration State or participating State, collects its own per-truck fee for itself as an additional flat fee entry barrier to interstate operations on and over Michigan highways.

Third, while the SSRS directs States to identify for purposes of fee collection "the number of commercial motor vehicles the carrier operates in a State," it expressly prohibits the use of "decals, stamps, cab cards, or any other means of registering or identifying specific vehicles operated by the carrier." 49 U.S.C. § 14504(c)(2)(B)(iii); (iv)(I). Michigan's PSC, however, requires interstate carriers using Michigan-plated trucks to schedule each truck by make, model, and serial number and to obtain a vehicle-identifying decal for each.

Fourth, the SSRS permits the collection of a "fee for each participating State that is . . . not to exceed $10 per vehicle" and declares that "[t]he charging or collection of *any* fee under this section that is not in accordance with the fee system established [herein] shall be deemed to be a

List Form may be viewed at <http://www.michigan.gov/mpsc> ("Motor Carrier: All Forms") (viewed April 13, 2005).

burden on interstate commerce," 49 U.S.C. § 14504(c)(2)(B)(iv)(III); (C) (emphasis supplied). Michigan, however, charges and collects a $100-per-vehicle fee from interstate carriers operating Michigan-plated trucks.

Although not expressly identified by the Michigan legislature as a charge "for" filing proof of insurance or registering a motor carrier's operating authority, the manner by which the Interstate Decal Fee is collected *is* quite literally a State "registration requirement" for interstate motor carriers that conflicts with Section 14504. In this regard, preemption analysis discerns legislative intent by applying logical, plain-meaning understandings to the effect of Congress's words. Thus, for example, a prohibition against cigarette advertising "requirements and prohibitions" quite naturally encompasses State laws regulating advertising content and location alike, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001), and a preemptive strike against vehicle emissions "standards" is just as applicable to restrictions on vehicle purchases as it is to restrictions on sales. *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 124 S.Ct. 1756, 1762 (2004). Likewise, Michigan's law requiring an interstate carrier to present and identify itself to the PSC and pay a per-truck fee "for" regulatory funding is just as much a "registration requirement" as is a law requiring the same carrier to identify itself to the same commission and make its per-truck payment "for" the filing of proof of insurance. Both procedures serve as the interstate carrier's registration – the securing of its ticket or pass into the State – and both are governed by Section 14504's broad preemptive sweep.

Michigan Comp. Laws § 478.7(4) provides evidence of the convenient "form over substance" nature of Respondents'

argument. That statutory provision, which assesses Michigan's $10 fee on interstate carriers, does not include any legislative directive that the fee is charged "for" filing of proof of insurance. Yet, Respondents identify Mich. Comp. Laws § 478.7(4) as the law through which "Michigan has complied with the SSRS" (*Respondents' Brief* at 47) even though the statute says nothing about insurance filings and makes no mention of the SSRS. *See also Schneider Nat'l Carriers, Inc. v. State*, 247 Mich.App. 716, 637 N.W.2d 838, 839-40 (2001), *vacated on other grounds*, 468 Mich. 862, 659 N.W.2d 228 (2003) (agreeing with Respondents that the PSC may collect the $10 charge as its SSRS fee even without express legislative direction authorizing collection of the fee "for" an insurance filing). Similarly, assessment of the $100 Interstate Decal Fee under Mich. Comp. Laws § 478.2(2) is no less a "registration requirement" merely because the statute makes no reference to proof of insurance.

3. As the United States observes (*U.S. Brief* at 22), even if the Interstate Decal Fee does not meet a narrow definition of a "registration requirement" expressly preempted by Section 14504, it is still impliedly preempted because it contravenes and frustrates the purpose of the SSRS, not to mention the more general regulatory authority of the Federal Motor Carrier Safety Administration ("FMCSA") to license the for-hire truck transportation of goods moving in interstate commerce.[4] On this point, w-

[4] The categories of preemption analysis are not "rigidly distinct." *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990). In addition, a declaration of express preemptive intent by Congress does not foreclose application of conflict preemption principles as well. *Compare Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (Congressional language "defining the pre-emptive reach of a statute implies

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may easily dismiss Respondents' comment that carriers can effectively comply with both state and federal law (*Respondents' Brief* at 38-39) because a finding of conflict preemption does not depend on the impossibility of concurrent compliance. *Geier*, 529 U.S. at 873. Instead, we need only note as we have before that a conflict exists because exaction of the Interstate Decal Fee "stands as an obstacle" to full implementation of the SSRS and otherwise frustrates the accomplishment of federal law. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Geier*, 529 U.S. at 873.

Respondents selectively emphasize only a portion of the legislative history for the predecessor "bingo card" program and overlook the legislative gloss attendant to the SSRS itself. Certainly, Congress was concerned about illegal trucking (largely because of the harm caused to authorized carriers) when the "bingo card" program was authorized in 1965, but it also sought to afford interstate carriers "relief from [a] multiplicity of different State registration requirements" by establishing a *uniform* registration procedure. H.R. Rep. No. 89-253 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2923, 2929. In addition, by the time the SSRS was adopted in 1991, the House Conferees were most concerned about industry estimates that the "bingo card" program was costing carriers "up to $250 million per year." H.R. Conf. Rep. No. 102-404 (1991),

that matters beyond that reach are not pre-empted") *with Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995) (distinguishing *Cipollone* and ruling that an express preemption clause does not "entirely foreclose[ ] any possibility of implied pre-emption"). *See also Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000) (ruling that neither an express preemption provision nor a saving clause bars application of ordinary conflict preemption rules).

reprinted in 1991 U.S.C.C.A.N. 1679, 1817.[5] Thus, the SSRS was implemented as a new "streamlined administrative process" "intended to benefit the interstate carriers by eliminating unnecessary compliance burdens" through a single State registration procedure. H.R. Conf. Rep. No. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1817-1818. Perhaps most important is Section 14504 itself and its declaration of Congress's intent to "establish a fee system . . . that . . . *minimizes* the costs of complying with the [State] registration system . . . " by way of directive to the Secretary of Transportation. 49 U.S.C. § 14504(c)(2)(B)(iv)(II) (emphasis supplied).

Michigan's assessment of the Interstate Decal Fee conflicts directly with Congress's purpose. It establishes a *non-uniform* registration procedure different from that permitted by the SSRS, imposes an *additional* registration requirement on some carriers already SSRS-registered in other States, and most obviously *increases* interstate carrier costs by imposing a per-truck fee ten times the $10 fee cap established by federal law. Furthermore, the Michigan Court of Appeals decision upholding the fee invites other States to enact so-called "regulatory fees" and associated registration procedures standing as barricades to interstate trucking at borders throughout the country.

It is, in the end, commerce among the States that is at issue here, and it is Congress and its chosen designee – the FMCSA – that possess the constitutional authority to

[5] Indeed, the House Public Works and Transportation Committee originally proposed to preempt State registration of interstate carriers altogether, believing it to be a "costly mechanism which does not serve a purpose that justifies its cost." H.R. Rep. No. 102-171(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 1526, 1575.

regulate interstate commerce and authorize for-hire interstate trucking in and across the Nation. As a result, although Michigan has the unquestioned authority to oversee matters of highway safety within its boundaries, it may not invoke that authority to single out interstate carriers for imposition of burdensome registration requirements that block interstate commercial activity the FMCSA has sanctioned pursuant to federal law. *Cf. Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61, 64 (1954) (State size and weight laws may not be used to revoke or suspend a motor carrier's right to engage in federally-authorized interstate activities). The Interstate Decal Fee is not rescued by the use to which it is put because, whatever its purpose, it stands in direct conflict with Section 14504's declaration that any "registration requirement" exceeding the SSRS standards and any flat fee exceeding $10 per vehicle is a burden on interstate commerce.

B. Limiting The $100 Registration Requirement To Interstate Carriers Operating Michigan-Plated Trucks Does Not Save The Interstate Decal Fee From Preemption

1. In a further attempt to distinguish assessment of the Interstate Decal Fee from the carrier registration standards established by Section 14504, Respondents would have the Court view the flat $100 charge as a mere vehicle fee associated with the license-plating of trucks in Michigan. Michigan's fee-imposing procedure, however, is not mere vehicle registration. Rather, it is interstate *carrier* registration by the very motor carrier regulatory agency at which the SSRS mandate is directed. The United States is therefore unquestionably correct that Michigan's fee is "imposed on interstate carriers *by reason*

of their operation in interstate commerce" (*U.S. Brief* at 20) and is thus preempted by Section 14504.

That the Interstate Decal Fee is imposed upon interstate *carriers*, not vehicles, is evident from both the Michigan fee-imposing statute and the vehicle-leasing example described earlier (*supra* at 4, n.3). By its literal terms, Mich. Comp. Laws § 478.2(2) requires "[a] *motor carrier*" to pay the annual $100 fee "for each vehicle operated by the motor carrier which is registered in this State and operated entirely in interstate commerce." (Emphasis supplied). Thus, in a truck-leasing scenario, even if an interstate carrier is properly SSRS-registered in another State, Michigan law seeks out that carrier for registration on the PSC's Equipment List Form and requires a fee not from the truck owner/lessor purchasing license plates in Michigan, but from the interstate *motor carrier* leasing the trucks. And it is Michigan's PSC – the State's *motor carrier* regulatory body – that carries out the registration process and assesses the fee, potentially subjecting any non-complying interstate carrier to fines of up to $500 for each violation plus the PSC-impounding of vehicles and injunctive relief as well. *See* Mich. Comp. Laws §§ 479.12; 479.16; 479.19.

In contrast, *vehicle* registration in Michigan – including the plating of passenger cars and pick-up trucks and the IRP-plating of commercial motor vehicles operated by for-hire and private carriers alike – is administered by the Michigan Secretary of State, and *vehicle* registration requirements are generally imposed upon the vehicle *owner*. Mich. Comp. Laws § 257.217(1) ("owner of a vehicle that is subject to registration . . . shall apply to the Secretary of

State").[8] The Interstate Decal Fee, however, has nothing to do with vehicle ownership. Rather, the fee is imposed only on a for-hire interstate carrier as a condition of operating any vehicle in interstate commerce on Michigan highways and roads. Mich. Comp. Laws § 478.2(2) (requiring fee payment by the "motor carrier" "for each vehicle operated" "in interstate commerce"); § 478.7(1) (prohibiting interstate transportation unless for-hire carriers have "registered with the [PSC] and paid the required registration and vehicle fees").

2. Nor can the Interstate Decal Fee be justified as a "plating" fee based on Respondents' reference to the intrastate fee assessed under Mich. Comp. Laws § 478.2(1). Any notion that Mich. Comp. Laws § 478.2(1) and § 478.2(2) collectively impose a vehicle plating charge on all motor carrier vehicles is contradicted by Respondents' acknowledgment (*Respondents' Brief* at 44, n.7) that the $100 fee under Mich. Comp Laws § 478.2(1) is assessed against *all* intrastate-operating motor carriers regardless of the State in which their vehicles are plated. As Respondents explain in defense of *that* fee, Mich. Comp. Laws § 478.2(1) requires payment of the $100 intrastate fee "for the privilege of making intrastate deliveries" (*Respondents' Brief* at 21), not for the purchase of a license plate. The only logical construction of the statute, therefore, is that the fee under subsection (1) of Mich. Comp. Laws § 478.2 is charged because the carrier operates intrastate, while the fee under subsection (2) is levied because the carrier operates interstate. In other

[8] Under the IRP, rules do exist for permitting motor carriers using leased vehicles to assume the owner's vehicle plating obligation. *See generally* International Registration Plan, Art. IX, § 904 (2004 rev.).

words, the distinction between two motor carriers subjected to the separately-imposed fees is that the first is assessed *on account of* its intrastate operations and the second is assessed *on account of* its exclusively interstate activities.[7]

The statutory provisions *in pari materia* here do not include Mich. Comp. Laws § 478.2(1). Rather, the three statutes that should be read together begin with Mich. Comp. Laws § 478.7(1), which imposes a registration requirement upon all for-hire interstate carriers by prohibiting them from engaging in the interstate transportation of property in Michigan "without first having *registered* with the [PSC] and paid the required registration and vehicle fees." (Emphasis supplied). Next is Mich. Comp. Laws § 478.7(4), upon which the PSC bases the $10 registration and vehicle fee charged to interstate carriers operating trucks plated out of State. Finally there is Mich. Comp. Laws § 478.2(2), which requires a $100 registration and vehicle fee from interstate carriers using trucks plated in Michigan. Read together, the statutes demonstrate that, when the PSC registers for-hire interstate carriers, Michigan law complies with the $10 fee cap under Section 14504 for some – but not all – of those registrations.

In practice and effect, Michigan law requires registration and Interstate Decal Fee payment of Petitioners and their fellow class members because they operate in interstate commerce, which is exactly what Section 14504

[7] In addition, as the United States observes (*U.S. Brief* at 28), the charging of both fees on a flat per-truck basis demonstrates that neither fee can be construed as anything in the nature of a license-plating charge because plating fees must be apportioned under both the IRP and Michigan law.

prohibits unless carried out in accordance with the SSRS. The fact that only some interstate carriers (those using Michigan-plated trucks) are charged a fee exceeding the $10 federal fee cap does not mean that the SSRS is any less preemptive of Michigan law. *Cf. American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 282 (1987) (Pennsylvania's flat truck taxes discriminated against "*some* participants in interstate commerce" in contradiction of the dormant Commerce Clause) (emphasis supplied). Accordingly, even if the Michigan Court of Appeals ruling had acknowledged Respondents' theory that the Michigan plating of a truck creates a "presence"-related basis for the charge, limiting the $100 fee to interstate carriers operating trucks with Michigan plates does not save the fee from preemption.[8]

[8] Notably, Respondents do not take issue with our point (*Petitioners' Brief* at 27) that the IRP base-plating of a truck in any particular State has little to do with the truck's "presence" there. Also, it is not certain that Michigan always draws a clear line of demarcation between Michigan-plated carriers and those that plate their trucks elsewhere. Respondents take issue with our comment that the PSC "waives" the $10 SSRS fee for carriers operating Michigan-plated trucks, contending that under Mich. Comp. Laws § 478.7(4) the PSC's authority for the $10 fee is limited to carriers using trucks plated outside Michigan (*Respondents' Brief* at 40-41). Notwithstanding the Michigan Court of Appeals plain statement that the PSC "waives" the $10 fee on Michigan-plated trucks (J.A. 83, n.6) and despite the Michigan SSRS form's direction to Michigan-plated carriers to pay $100 in lieu of $10 (J.A. 67), it appears that Michigan permits other SSRS States to collect the $10 fee from *all* interstate carriers regardless of where their trucks are plated. A survey of SSRS forms used in the Midwest, for example, reveals that all interstate carriers, wherever their trucks are plated, are directed by Iowa, Kansas, Kentucky, and Ohio to pay $10 for each truck operated in Michigan. *See* <http://www.iadot forms.dot.state.ia.us/iowadotforms/Library.aspx> ("Blank Forms; Motor Carrier Services") (viewed April 13, 2005); <http://www.kcc.state.ks.us/trans/forms.htm> ("Kansas Trucking Application") viewed April 13,

(Continued on following page)

The Interstate Decal Fee, .therefore, is no better defended by its imposition upon a subgroup of interstate carriers than it is by the use to which it is put. Whether called a "plating charge" or a "regulatory fee," the $100 fee and its assessment are governed by Section 14504 because they serve to register motor carriers with the PSC for purposes of authorizing exclusively interstate activities in Michigan. Under Section 14504, Congress declared that non-conforming State registration requirements are a burden on interstate commerce and thereby made the SSRS standards preemptive in force and effect. Consequently, because it exceeds the SSRS standards, the $100 Interstate Decal Fee is preempted.

2005): <http://www.transportation.ky.gov/dmc/forms_applications.htm> ("Kentucky Transportation Application") (viewed April 13, 2005); <http://www.puco.ohio.gov/PUCO/IndustryTopics/Topic.cfm?doc_id=273> ("Interstate Single State Registration Packets – Property") (viewed April 13, 2005). *See Schneider*, 247 Mich.App. 716, 637 N.W.2d 838 (ordering $10 refunds to carriers that paid both $10 and $100 on the same vehicles). Therefore, it appears that some interstate carriers using Michigan-plated trucks are paying Michigan not $10 or $100, but $110 per truck annually, which cannot be squared with any of the statutory analysis or the anecdotal justification employed by Respondents in defense of Michigan's fees.

CONCLUSION

For the foregoing reasons, the decision of the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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MID-CON FREIGHT SYSTEMS, INC., ET AL., PETITIONERS

v.

MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The State of Michigan imposes upon motor carriers a $100 annual fee for each vehicle license-plated in the State and "operating entirely in interstate commerce." Mich. Comp. Laws Ann. § 478.2(2) (West 2002). The question presented in this case is as follows:

Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 U.S.C. 14504.

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ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a $100 annual fee imposed by the State of Michigan on each commercial motor vehicle "registered in this state and operating entirely in interstate commerce," Mich. Comp. Laws Ann. (MCL) § 478.2(2) (West 2002), is preempted by the federal law that governs the Single State Registration System (SSRS) for commercial motor vehicles. The United States has a substantial interest in the Court's resolution of that question. Congress has assigned responsibility for administration of the SSRS to the Secretary of Transportation, see 49 U.S.C. 14504, and the Court's resolution of the preemption issue presented here may have a significant economic impact upon interstate motor carriers. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. Congress has long required motor carriers operating in interstate commerce to obtain a certificate of public convenience and necessity or comparable form of authorization from the federal government. "[I]n 1965, Congress authorized States to require interstate motor carriers operating within their borders to register with the State their Interstate Commerce Commission (ICC) operating permits." *Yellow Transp., Inc.* v. *Michigan*, 537 U.S. 36, 39 (2002); see Pub. L. No. 89-170, § 2, 79 Stat. 648 (49 U.S.C. 302(b)(2) (1970)). Congress provided that such a requirement by a State to register an ICC certificate or permit "shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards * * * promulgated by the Commission." *Ibid.*; see *Yellow Transp.*, 537 U.S. at 39. Former Section 302(b)(2) further provided: "To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall * * * constitute an undue burden on interstate commerce." 49 U.S.C. 302(b)(2) (1970).[1]

[1] The Chairman of the House Committee on Interstate and Foreign Commerce stated, with respect to the 1965 law that specifically authorized the States to require registration of an interstate carrier's ICC certificate, that such registration would "encourage greater participation by the States in curbing illegal for-hire trucking" by enabling state officials to identify motor carriers operating in interstate commerce without the requisite federal authority. 111 Cong. Rec. 9672 (1965) (Rep. Harris). It appears that some States were requiring interstate carriers to register their ICC certificates even before the 1965 legislation was enacted. The House Report accompanying the relevant bill explained that, "[a]t present, registration requirements differ widely among the States; and this circumstance alone may impose undue burdens on carriers. Therefore, enactment of this legislation is necessary in order that relief from this multiplicity of different State registration requirements be achieved." H.R. Rep. No. 253, 89th Cong., 1st Sess. 10 (1965).

In its rules implementing Section 302(b) and its statutory successors, the ICC initially imposed a $5-per-vehicle cap on the fee that a State could charge for registration of a carrier's ICC certificate. See 49 C.F.R. 1023.33 (1971). That limit was subsequently increased to $10 per vehicle. See 47 Fed. Reg. 8365-8366 (1982); 49 C.F.R. 1023.33 (1982); *Yellow Transp.*, 537 U.S. at 39. The means by which registration was accomplished under the ICC's rules came to be known as the "bingo card" system because each State issued a stamp for each vehicle operating within its borders, and the motor carrier affixed the stamp to a card carried in the vehicle, as proof of registration. 49 C.F.R. 1023.32 (1992); *Yellow Transp.*, 537 U.S. at 39.

The $10-per-vehicle fee for registering an interstate motor carrier's federal certificate has never been regarded as the only state "registration" fee that the carrier may be required to pay. A motor vehicle operating in interstate commerce is always required to have a license plate from some State, and the fees charged for that registration and plating of commercial trucks can run into the hundreds or even thousands of dollars. See, *e.g.*, *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 271, 282 (1987) (noting that Pennsylvania's registration fees for some commercial trucks were as high as $1125 during the years 1980-1982, and that "[t]he State's vehicle registration fee has its counterpart in every other State and the District of Columbia").

Congress has encouraged States to join the International Registration Plan (IRP), a reciprocity agreement among the States of the United States and the provinces of Canada for the registration/license-plating of commercial motor vehicles. See 49 U.S.C. 31704; *Scheiner*, 483 U.S. at 271. Under the IRP, a commercial motor vehicle is registered and

license-plated in a single State; it can then travel freely through other participating States for which an IRP registration fee has been paid without registering separately in each; and the State of registration apportions the registration fees among the other States in which the vehicle traveled during the prior year in proportion to the volume of miles traveled. *Id.* at 271-272 & n.6; see MCL § 257.801g (West 2001) (provision of Michigan law governing registration of vehicles with the Secretary of State and apportionment of fees under the IRP). All 48 contiguous States currently participate in the IRP. Federal law provides that "Section[] 31704 * * * of [Title 49] do[es] not limit the amount of money a State may charge for registration of a commercial motor vehicle." 49 U.S.C. 31707.

2. In 1991, in order to reduce the administrative burdens that the bingo card system had imposed on interstate motor carriers, Congress directed the ICC to implement a new system, called the Single State Registration System (SSRS), under which a motor carrier operating in interstate commerce "is required to register annually with only one State by providing evidence of its Federal registration." 49 U.S.C. 14504(c)(1)(A). To register under the SSRS, the carrier submits evidence of its federal operating authority, proof of insurance or qualification as a self-insurer, the appropriate registration fees, and the name of a local agent for service of process. 49 U.S.C. 14504(c)(2)(A)(i)-(iv). The carrier must also inform the registration State of "[t]he number of motor vehicles [the carrier] intends to operate in each participating State during the next registration year." 49 C.F.R. 367.4(c)(4)(i); see 49 U.S.C. 14504(c)(2)(B)(iv)(I). SSRS registration does not, however, require the identification or registration of specific vehicles. Indeed, the statute provides that the standards promulgated by the Secretary for SSRS registration "shall not require decals, stamps, cab cards, or any other means of registering or identifying

specific vehicles operated by the carrier." See 49 U.S.C. 14504(c)(2)(B)(iii).[2]

Under the SSRS, each participating State may charge a fee, "equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. 14504(c)(2)(B)(iv)(III).[3] That fee, however, may now be charged only for filing the required proof of insurance. See 49 U.S.C. 14504(c)(2)(A)(ii), 14504(c)(2)(B)(iv). No fee may be charged for filing the evidence of federal registration itself. 49 U.S.C. 14504(c)(2)(B)(v). The fees are collected by the State in which the carrier is registered for SSRS purposes, which then is responsible for distributing the money among the other States through which the vehicle travels. 49 C.F.R. 367.6(a). A motor carrier is required to select "the State in which it maintains its principal place of business" as its SSRS registration State, unless that State is not a participant in the SSRS. 49 C.F.R. 367.3(a).[4]

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[2] Information as to the aggregate number of vehicles the carrier intends to operate in each State is necessary both to compute the carrier's total SSRS fee and to enable the registration State to apportion that fee among the various States in which the carrier's vehicles operate.

[3] The 39 States that participated in the bingo card system as of January 1, 1991, are eligible to participate in the SSRS. 49 U.S.C. 14504(c)(2)(D). The 11 ineligible States are listed in H.R. Rep. No. 171, 102d Cong., 1st Sess. Pt. 1, at 49 (1991). Oregon is eligible to participate but does not do so. Thus, 38 States participate in the SSRS program.

[4] The State in which the carrier is registered for purposes of the SSRS, see 49 C.F.R. 367.3(a), will not necessarily be the same as the State in which the vehicles operated by the carrier are registered (*i.e.*, license-plated) for purposes of the IRP. Under the IRP, a carrier's "base jurisdiction" for license-plating purposes is "the jurisdiction where the registrant has an established place of business, where distance is accrued by the fleet and where operational records of such fleet are maintained or can be made available." International Registration Plan, Inc., *International Registration Plan* § 210 (revised Oct. 1, 2004). That provision will often give large carriers considerable discretion in choosing the State in which their vehicles will be license-plated. See *Single State Ins. Registration*, 9 I.C.C. 2d 610, 620-621 (1993) (recognizing that the "principal place of

When Congress abolished the ICC in 1995, it assigned authority to administer the SSRS to the Secretary of Transportation. *Yellow Transp.*, 537 U.S. at 39-40 n.* (citing ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803). In its current form, the Title 49 provision that establishes the SSRS provides in pertinent part as follows:

> The requirement of a State that a motor carrier, providing [interstate] transportation * * * and providing transportation in that State, must register with the State is not an unreasonable burden on [interstate] transportation * * * when the State registration is completed under standards of the Secretary [of Transportation] under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

49 U.S.C. 14504(b). The statute further states that "[t]he charging or collection of any fee under this section that is not in accordance with the fee system established under subparagraph (B)(iv) of this paragraph shall be deemed to be a burden on interstate commerce." 49 U.S.C. 14504(c)(2)(C).

3. The provision of Michigan law through which that State implements the SSRS is MCL § 478.7. That provision was enacted in 1988 (and amended in 1989), before the SSRS was enacted by Congress in 1991, see MCL § 478.7 (Historical and Statutory Notes), and is administered by respondent Michigan Public Service Commission (MPSC). Subsection (1) of MCL § 478.7 provides that "[a] motor carrier shall not engage in interstate or foreign transportation of property for compensation without first having registered with

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business" test for SSRS registration will give carriers less flexibility to choose a registration State than is available under the IRP, but rejecting a commenter's suggestion that the IRP rule for selection of a registration State should be adopted for purposes of the SSRS).

the [MPSC] and paid the required registration and vehicle fees." Subsection (2) provides that a motor carrier operating in Michigan under authority granted by the ICC "shall file and maintain a record of that authority with the [MPSC]." Although this provision on its face continues to require *every* carrier operating in interstate commerce within the borders of Michigan to file evidence of its federal certificate with the State, it apparently has been administered by the MPSC, since the SSRS went into effect, in a manner that is consistent with the SSRS—*i.e.*, to provide for the filing of the proof of federal registration and associated information with the MPSC only when the carrier selects Michigan as its single registration State in accordance with the SSRS. See J.A. 26-27.

Subsection (4) of MCL § 478.7 provides that "[t]he annual fee levied on each interstate or foreign motor carrier vehicle operated in this state and licensed in *another* state or province of Canada shall be $10." MCL § 478.7(4) (emphasis added). That provision is consistent with the $10 cap now in effect under the SSRS. As is clear from its text, however, MCL § 478.7(4) does not apply to vehicles that are operating in interstate commerce and are licensed-plated in *Michigan*. The fee requirement for such vehicles is instead contained in MCL § 478.2(2), the specific provision of Michigan law at issue in this case. Under that provision, Michigan imposes "an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce." It is undisputed that the statutory phrase "registered in this state" refers to commercial motor vehicles *license-plated* in Michigan, not to vehicles that are license-plated in other States but are operated by carriers for whom Michigan is the SSRS registration State. See J.A. 59 (affidavit of state official explains that, "[h]istorically, the Michigan Public Service Commission [MPSC] has interpreted MCL 478.2(2)'s applicability re-

quirement of 'vehicles registered in Michigan' to mean vehicles which have Michigan license plates obtained through the Michigan Secretary of State"); J.A. 24, 27, 57, 67; Pet. 6 n.3, 23-24; Br. in Opp. 2, 11, 17, 19, 20.

The applicability of the two different fees imposed on trucks operating in interstate commerce within Michigan's borders is reflected in the SSRS registration form utilized by the MPSC. See J.A. 65-67. That form states that "ICC [now DOT] carriers with vehicles based outside of Michigan must register those vehicles on this form at a fee of $10.00 per vehicle," but that "[v]ehicles based in Michigan are required to have a $100.00 MPSC decal (Household Goods carriers $50)." J.A. 67 n.* For the latter vehicles, the Michigan SSRS form directs the registering interstate carrier to "[u]se Equipment List (form P-344-T) to order MPSC decals." *Ibid.*

4. Petitioners filed suit in the Michigan Court of Claims, contending that MCL § 478.2(2) imposes a registration fee in excess of the $10-per-vehicle SSRS maximum and is therefore preempted by 49 U.S.C. 14504. The Court of Claims denied petitioners' motion for summary judgment. Pet. App. 36-50. The court held that MCL § 478.2(2) is not preempted by federal law because Section 478.2(2)

> applies only to vehicles registered in Michigan by Michigan-licensed motor carriers, i.e., where Michigan is the "registering state." The SSRS fee system places a $10.00 annual vehicle fee limit on only the "participating states," however, not on the "registering state." The SSRS neither prohibits nor preempts [MCL § 478.2(2)'s] vehicle fee.

Pet. App. 46. The Michigan Court of Claims subsequently granted the State's motion for summary disposition, *id.* at 54-56, and denied petitioners' motion for reconsideration, *id.* at 57-72. In its order denying reconsideration, the court

reiterated its previously stated view that "[t]he fee limits that were imposed" by the SSRS and its statutory predecessors "applied only to states where the vehicles were not based and registered." *Id.* at 68.

5. The Michigan Court of Appeals affirmed. J.A. 68-102. The court rejected the view of the Michigan Court of Claims that the SSRS $10-per-vehicle limit is inapplicable to fees charged by the "registration state." J.A. 80-82. The court explained that "when the [federal] statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute." J.A. 82.

The Michigan Court of Appeals held, however, that the $100 annual fee imposed by MCL § 478.2(2) on vehicles license-plated in the State and operating solely in interstate commerce is a "regulatory fee" rather than a "registration fee" and therefore is not preempted by 49 U.S.C. 14504. J.A. 83-85. The court explained that

> the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the [state Motor Carrier Act], particularly covering costs of enforcing safety regulations. If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. Because the fee in MCL 478.2(2) is not a registration fee, it is not subject to preemption.

J.A. 83-84 (footnote and citation omitted).[5]

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[5] Under MCL § 478.2(1), the State also imposes "an annual fee of $100.00 for each self-propelled motor vehicle operated by or on behalf of" a licensed motor carrier. In the courts below, that provision was the subject of a separate challenge brought under the Commerce Clause. Although Section 478.2(1) does not on its face make the applicability of the fee dependent on the nature of the routes that a particular vehicle travels, the

6. The Michigan Supreme Court denied petitioners' application for leave to appeal. Pet. App. 73-75.

SUMMARY OF ARGUMENT

A. Since 1965, federal law has expressly authorized States to require interstate motor carriers to register proof of their federal operating permits, but has limited the fees that a State may charge in connection with that registration process. The $10-per-vehicle limit on such fees, first imposed by ICC regulation and subsequently adopted by Congress (see 49 U.S.C. 14504(c)(2)(B)(iv)(III)), ensures that States do not use the registration of federal operating authority as a means to impose disproportionate burdens on interstate carriage. The limit thus serves an important federal interest, even though States remain free to subject interstate carriers to a variety of fees and attendant administrative requirements, so long as those burdens are imposed on intrastate carriers as well.

B. As amended in 1978 and again in 1991, the current SSRS preemption provision is worded more broadly than was the predecessor provision contained in 49 U.S.C. 302(b)(2) (1970). Whereas former Section 302(b)(2) preempted "State requirements for registration of motor carrier certificates or permits issued by the [ICC]" to the extent that such requirements exceeded ICC standards, current 49 U.S.C. 14504(b) more generally encompasses "State registration requirement[s]" that "impose[] obligations in excess of the standards of the Secretary" of Transportation. The statute in its current form thus preempts state laws that require interstate carriers to register with the State on account of their interstate operations, except in accordance with the standards governing the SSRS, whether or not the relevant state law specifically requires registration of the carrier's federal operating authority.

C. MCL § 478.2(2) is preempted by federal law because it imposes the very sort of exorbitant and discriminatory burden on interstate commerce that the SSRS $10-per-vehicle limit is intended to prevent. Section 478.2(2) is a "State registration requirement" within the meaning of 49 U.S.C. 14504(b), and the fee it imposes plainly exceeds the $10-per-vehicle limit established by the governing federal statute and the Secretary of Transportation's implementing regulations. MCL § 478.2(2) is therefore expressly preempted by 49 U.S.C. 14504(b). But even if the term "State registration requirement" were construed not to encompass the challenged fee, MCL § 478.2(2) would be impliedly preempted because it subverts the congressional policy judgment reflected in the SSRS.

D. The fact that fees collected under MCL § 478.2(2) are subsequently used by the State for highway-related purposes is irrelevant to the preemption analysis. Like its statutory and regulatory predecessors, 49 U.S.C. 14504 limits the amount of the fee that a State may collect in certain circumstances but does not constrain the State's subsequent use of the money it receives. Because MCL § 478.2(2) effects precisely the singling out of interstate commerce that the $10-per-vehicle SSRS registration limit was intended to prevent, it is preempted by federal law, regardless of the use to which the funds are subsequently put.

E. The $100-per-vehicle fee under MCL § 478.2(2) is not saved from preemption by the fact that it is imposed only upon commercial motor vehicles license-plated in Michigan.

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parties to that dispute agree that, in practice, the State imposes the fee only upon vehicles that engage at least in part in "intrastate" operations —*i.e.*, vehicles that make at least one delivery during the year between two points within the State of Michigan. See J.A. 22-23; 03-1230 Pet. at 3. The Michigan Court of Appeals rejected the constitutional challenge to Section 478.2(1), see J.A. 98-102, and this Court has granted certiorari to review the question. See *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, No. 03-1230 (Jan. 14, 2005).

Nothing in the text or history of 49 U.S.C. 14504 suggests that the SSRS fee limit is inapplicable to vehicles license-plated in the charging State, and any such exception would subvert Congress's effort to prevent discrimination against interstate carriage. Nor does MCL § 478.2(1), under which the State imposes a $100 annual fee on *other* Michigan-plated commercial motor vehicles, provide a basis for disregarding the facially discriminatory character of MCL § 478.2(2).

ARGUMENT

THE $100 ANNUAL FEE IMPOSED BY MCL § 478.2(2) ON MOTOR VEHICLES LICENSE-PLATED WITHIN THE STATE AND "OPERATING ENTIRELY IN INTERSTATE COMMERCE" IS PREEMPTED BY 49 U.S.C. 14504

The terms "register" and "registration" are a potential source of confusion in this case because a motor carrier operating in interstate commerce must comply with two distinct registration requirements. For purposes of the SSRS, the carrier registers in a single State (typically the State in which the carrier has its principal place of business, see 49 C.F.R. 367.3(a)) by submitting evidence of its federal operating authority, proof of insurance or qualification as a self-insurer, the appropriate fees (up to $10 per vehicle for each State in which the vehicle will operate), and the name of a local agent for service of process. 49 U.S.C. 14504(c)(2)(A)(i)-(iv); see p. 4, *supra*. In order for its SSRS fees to be computed and properly apportioned among the States in which its vehicles travel, the carrier must identify the *number* of vehicles that it intends to operate in each of the participating States. The carrier's obligations under the SSRS, however, do not include any duty to identify or register specific motor vehicles. See pp. 4-5 & note 2, *supra*.

Each motor vehicle operating in interstate commerce is also subject to the separate, generally applicable state-law

requirement—which applies as well to non-commercial motor vehicles (*e.g.*, passenger cars) and to commercial motor vehicles operating wholly intrastate—that the individual vehicle must be registered in some State, and that the operator must obtain a license plate for the vehicle in connection with that distinct state registration process. The fees charged for that registration and for issuance of a license plate may run into the hundreds or even thousands of dollars for large commercial motor vehicles. The State in which a particular vehicle is license-plated will sometimes, but not always, be the same as the operating carrier's SSRS registration State. Under current law and practice, license-plating of motor vehicles used in interstate commerce is typically accomplished by the base-plating State in accordance with the IRP. For present purposes, the salient features of the IRP are that (a) each vehicle is license-plated in a single State, (b) a fee for each State in which the vehicle is to be operated is paid to the license-plating State's IRP administrative office, (c) the vehicle may then travel freely throughout the States for which IRP registration has been paid, and (d) the total registration fee collected by the license-plating State is apportioned on the basis of mileage traveled among the various States in which the vehicle operates. See IRP §§ 102, 104, 300, 400; *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 271-272 & n.6 (1987); pp. 3-4, *supra*.

The Michigan statutory provision that is at issue in this case implicates both types of registration procedures. MCL § 478.2(2) applies only to motor vehicles that are "registered" (in the sense of license-plated) in the State of Michigan. See pp. 7-8, *supra*. Under most circumstances, the federal statutory provision (49 U.S.C. 14504) governing the SSRS would not limit the authority of the license-plating State to assess any otherwise lawful fees that it chose to levy in connection with that separate "registration" process.

MCL § 478.2(2)'s $100 annual fee is imposed, however, not upon Michigan-plated vehicles generally, but only upon those that "operat[e] entirely in interstate commerce." Because Section 478.2(2) is triggered by interstate operations, it is in conflict with the express terms of 49 U.S.C. 14504(b) and with the concerns that underlie that provision and its $10-per-vehicle maximum for SSRS registration. MCL § 478.2(2) therefore is preempted by federal law.

A. The $10-Per-Vehicle Limit For State Registration Of Interstate Carriers Under The SSRS Serves To Prevent States From Imposing Distinct Or Disproportionate Burdens On Interstate Commerce

1. In 1965, Congress expressly authorized each State to require an interstate motor carrier operating within its jurisdiction to "register its certificate of public convenience and necessity or permit issued by the [ICC]." Pub. L. No. 89-170, 79 Stat. 648 (49 U.S.C. 302(b)(2) (1970)). The 1965 statute provided that such registration requirements "shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards * * * promulgated by the [ICC]." *Ibid.* That basic authorization has remained in place for the past 40 years, though the adoption of the SSRS has streamlined the process by which registration is accomplished.

The fees that a State may charge in connection with that registration process, however, have consistently been limited by federal law. Thus, the 1965 statute that initially authorized the States to require registration of a carrier's federal operating authority provided: "To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall * * * constitute an undue

burden on interstate commerce." 49 U.S.C. 302(b)(2) (1970). In implementing former Section 302(b), the ICC initially adopted rules setting a $5-per-vehicle maximum on the fee that a State could charge for registration of a carrier's ICC certificate. The ICC subsequently raised that cap to $10 per vehicle, and the $10-per-vehicle regulatory limit remained in effect until it was adopted by Congress in 1991. See pp. 3, 4-5, *supra*; 49 U.S.C. 14504(c)(2)(B).

2. Congress had good reason to focus on state requirements for registration of ICC certificates and on the fees charged by States for such registration. The distinctive feature of carriers having such certificates (or, under the current statutory regime, carriers registered by the Secretary of Transportation, see 49 U.S.C. 13901, 13902) is that they operate *in interstate commerce*. States historically have been prohibited by the Commerce Clause from regulating interstate commerce as such. They are also prohibited by the Commerce Clause from discriminating against out-of-State commercial entities, see, *e.g.*, *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995) ("States are barred from discriminating against foreign enterprises competing with local businesses."), or against in-State commercial entities based on their participation in interstate commerce, see, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997) (State violates the Commerce Clause when it "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market"). Any attempt by a State to single out interstate motor carriers as such, or to impose requirements on such carriers that it does not impose on similarly situated intrastate operators, thus would raise substantial constitutional and policy concerns.

Specific federal authorization for States to require interstate carriers to register their federal certificates—a requirement that by its nature would have no application to

purely intrastate operators—eliminated any potential Commerce Clause objection to such a registration requirement. See 49 U.S.C. 302(b)(2) (1970) (requirement that interstate carrier register its federal certificate with the State "shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with [ICC] standards"). But if States were vested with *unrestricted* authority to require registration of an interstate operator's federal certificate, they might use that authority to subject interstate carriers to burdensome filing requirements and exorbitant fees that are not imposed on intrastate businesses. The $10-per-vehicle limit on fees for registration of ICC certificates or comparable federal operating authority thus serves the important federal interest in protecting interstate commerce against the imposition of distinct or discriminatory burdens. States remain free under the Commerce Clause, however, to levy a variety of other fees and taxes, including fees for the license-plating of individual vehicles, that do not single out carriers or vehicles operating in interstate commerce for discriminatory burdens.

The question in this case is whether the $100 annual fee imposed by MCL § 478.2(2) on Michigan-plated trucks operating entirely in interstate commerce is preempted by 49 U.S.C. 14504, the current version of the federal statute authorizing a State to require an interstate carrier to file evidence of its federal registration with the State, even though MCL § 478.2(2) does not specifically link the payment of the fee to the carrier's filing of its federal registration. As explained in Points B and C below, 49 U.S.C. 14504 preempts any state registration requirement imposed on an interstate carrier by reason of its interstate operations, and therefore preempts MCL § 478.2(2).

B. Section 14504(b) Preempts Any State Registration Requirement Imposed On Interstate Motor Carriers By Reason Of Their Interstate Operations

1. In 1978, as part of a revision and recodification of Title 49, Congress carried forward the provision in former 49 U.S.C. 302(b)(2) that a state-law requirement for an interstate carrier to register its ICC certificate or permit with the State is not an unreasonable burden on interstate commerce if the State's registration requirements are consistent with standards adopted by the ICC. See 49 U.S.C. 11506(b) (1982). The next sentence then stated: "When a State registration requirement imposes obligations in excess of the standards [of the ICC], the part in excess is an unreasonable burden." *Ibid.* The wording of this latter sentence was revised from the corresponding sentence in its predecessor, 49 U.S.C. 302(b)(2) (1970). Whereas the predecessor had provided that "state requirements for registration of motor carrier certificates or permits issued by the [ICC]" were an undue burden on interstate commerce to the extent they were in excess of ICC standards, the 1982 version provided that a "State registration requirement" was an undue burden on interstate commerce to the extent it imposed obligations in excess of the ICC standards.

It is unclear whether this change in language was intended to have any operative effect. On the one hand, the 1982 Act of Congress that enacted the overall revision was entitled "An Act To revise, codify, and enact *without substantive change* the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, 'Transportation.'' Pub. L. No. 95-473, 92 Stat. 1337 (emphasis added). On the other hand, the Reviser's Notes explaining the revision and recodification state that the revision of the language in the particular sentence at issue here was made "*for clarity.*" 49 U.S.C. 11506 note (1982) (emphasis added). This explanation could be read to suggest that the new

reference in the second sentence to "State registration requirement" was meant to clarify an intent that was perhaps thought to be implicit in the prior 49 U.S.C. 302(b)(2)—namely, that the federal statute preempted *any* state registration requirement (not merely a state registration requirement specifically applicable to the filing of the carrier's ICC certificate) that was imposed on a carrier by reason of its interstate operations and that was in excess of the ICC standards referred to in the first sentence.

There is no need in this case to decide whether the use of the new wording ("State registration requirement") in the second sentence of 49 U.S.C. 11506(b)(1982) was meant to have any broader preemptive effect than its predecessor. The 1982 statute was in turn superseded by the current SSRS provision in 1991, and as explained below (see pp. 18-20, *infra*), the preemptive scope of the current provision plainly is broader than the 1965 version. But whatever the scope of the 1982 version while it was in effect, there is no indication that it was either intended or understood to introduce broad preemption in traditional areas of state regulation, such as state requirements associated with the plating and licensing of individual motor vehicles, even though such provisions might literally constitute "State registration requirement[s]." Cf. *Scheiner*, 483 U.S. at 282 (noting that Pennsylvania's "vehicle registration fee has its counterpart in every other State and the District of Columbia").

2. In 1991, Congress extensively revised the statutory provision governing state registration requirements for carriers operating in interstate commerce. The new statute, now codified at 49 U.S.C. 14504, establishes the current SSRS registration system and specifies in considerable detail the permissible scope of the standards the Secretary of Transportation may adopt to govern state registration requirements under the SSRS system. See 49 U.S.C. 14504(c); pp. 4-5, *supra*.

Significantly, moreover, Congress in 1991 also revised the language specifying which state registration requirements would and would not constitute an unreasonable burden on interstate commerce. See 49 U.S.C. 14504(b). The relevant subsection in the 1982 version of the statute had stated, in its first sentence, that any requirement by a State that a motor carrier subject to federal regulation "*register the certificate or permit issued to the carrier*" by the ICC would not constitute an unreasonable burden on interstate commerce if the state requirement conformed to standards issued by the ICC. See 49 U.S.C. 11506(b) (1982) (emphasis added). The first sentence in subsection (b) of the current 49 U.S.C. 14504 is written more broadly. It provides: "The requirement of a State that a motor carrier, providing transportation" subject to federal jurisdiction, "*must register with the State*" is not an unreasonable burden on interstate commerce when "completed under standards of the Secretary under subsection (c)"—*i.e.*, when completed under the standards governing the SSRS (emphasis added). The second sentence of Section 14504(b) then provides that "[w]hen a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden" on interstate commerce. Those two sentences of the current Section 14504(b), read together, make clear that state requirements that interstate carriers "must register with the State" are preempted as a general matter if they do not conform to the standards governing the SSRS, whether or not those state requirements are specifically worded in terms of a carrier's registration of its *federal certificate* with the State.

There is, however, no indication that the current Section 14504(b), any more than its predecessor, was intended to preempt state laws and fees in traditional areas of state regulation, such as those governing registration and license-plating of trucks under the IRP. Rather, Section 14504(b) is most naturally read as prohibiting state registration require-

ments that are imposed on interstate carriers *by reason of* their operation in interstate commerce, except as authorized under the SSRS itself.[6]

C. Because MCL § 478.2(2) Imposes Distinct Burdens On A Class Of Interstate Motor Vehicles, Based On The Interstate Character Of Their Operations, It Is Preempted By 49 U.S.C. 14504

Because MCL § 478.2(2)'s $100 annual fee is imposed *only* on vehicles "operating entirely in interstate commerce," it effects precisely the singling out of interstate commerce for burdensome additional state requirements that 49 U.S.C. 14504(b) and the $10-per-vehicle SSRS cap are intended to

[6] Until it was repealed by the 1995 ICC Termination Act (see p. 6, *supra*), former 49 U.S.C. 10521(b)(4) (1994) provided that, with isolated exceptions not relevant here, the Title 49 provisions governing motor carriage did not "affect the taxation power of a State over a motor carrier." The House Report accompanying the Motor Carrier Act of 1980 expressed the understanding that the relevant federal statutory provisions

> do not apply to that body of taxes known as highway user taxes that are levied on owners or operators of motor vehicles because of their use of public highways. These highway user taxes include, but are not limited to, motor fuel taxes, registration fees, driver licenses, vehicle user taxes, ton-mile taxes, and other motor vehicle related taxes; the proceeds of these taxes, for the most part, are expended through a State highway fund or otherwise earmarked for highway construction, maintenance, or operation.

H.R. Rep. No. 1069, 96th Cong., 2d Sess. 45 (1980). A former ICC regulation similarly disclaimed any intent on the part of the agency "to affect the collection or method of collection of taxes or fees by a State from motor carriers for the operation of vehicles within the borders of such State." 49 C.F.R. 1023.104 (1991); see J.A. 84. None of those provisions suggests, however, that States have broad authority to single out or discriminate against interstate commerce by imposing upon interstate carriage burdens that are not placed upon intrastate transportation. The statutory and regulatory provisions governing state registration of interstate carriers' federal operating permits speak directly to that question, and those provisions have always imposed strict limits on the amount of fees that may be charged for such registration.

prevent. The fee imposed by MCL § 478.2(2) is not in terms a charge for the filing by the carrier of its proof of insurance (the only filing for which a fee may be charged under the SSRS), or even for the filing of any of the other items of information (*i.e.*, evidence of the interstate carrier's federal registration and the name of a local agent for service of process) that the carrier must submit to the registration State under the SSRS. See 49 U.S.C. 14504(c)(2)(A)(i) and (iv). The fee is triggered, however, by the very conduct—a motor carrier's transportation of goods in interstate commerce—that is the basis for the carrier's registration in a single State under the SSRS and the assessment of SSRS fees. The $10-per-vehicle SSRS limit would be deprived of any practical effect if States could assess a larger fee upon the same class (or a subclass) of the vehicles covered by the SSRS, based on the same criterion (operating in interstate commerce) that governs the SSRS process, simply by labeling the fee as a charge for something other than the filing of the specific information identified in the federal statute.

The relevant provision of Michigan law literally imposes a "State registration requirement" (49 U.S.C. 14504(b)) in addition to and different from that permitted under the SSRS, and it is therefore preempted. Michigan law requires an interstate carrier, before its Michigan-plated vehicles that are engaged entirely in interstate commerce may travel on the State's roads, to submit a non-SSRS form to the MPSC to obtain a decal for any such vehicle (J.A. 67 n.*); to list specific vehicles on that form (*ibid.*); and to pay a $100 fee for each such vehicle (MCL § 478.2(2)).[7] See also MCL § 478.7(1) (carrier must register with MPSC and pay all required

[7] As noted above, the SSRS system specifically does not permit a requirement that specific vehicles be identified or that decals be obtained or displayed for individual vehicles. See pp. 4-5, *supra*.

registration and vehicle fees before engaging in interstate or foreign commerce in Michigan). And because Section 478.2(2) applies only to vehicles operating in interstate commerce, it is precisely the *type* of "State registration requirement" that Congress sought to preclude. The $100-per-vehicle fee is plainly "in excess of the standards of the Secretary" of Transportation, which impose a $10-per-vehicle limit, and it is therefore expressly preempted by 49 U.S.C. 14504(b).

Moreover, even if the term "State registration requirement" in 49 U.S.C. 14504(b) did not literally apply to the $100-per-vehicle fee in MCL 478.2(2), Michigan's assessment of that fee on vehicles "operating entirely in interstate commerce" would be impliedly preempted because it directly subverts Congress's efforts to minimize burdens targeted specifically at interstate transportation by motor carrier. This Court has made clear that state law may be preempted based on an implied conflict with federal law, even when the relevant federal statute contains an express preemption provision that does not cover the state law at issue. See *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 867-874 (2000). The fee imposed by MCL § 478.2(2) impliedly conflicts with 49 U.S.C. 14504 because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). The clear inconsistency between MCL § 478.2(2) and the congressional policy judgment reflected in the SSRS provides an independent basis for holding Section 478.2(2) to be preempted, whether or not the $100-per-vehicle fee is a "State registration requirement" within the meaning of 49 U.S.C. 14504(b).

D. The Fact That The Contested Fees Are Used After Collection To Finance The State's Regulatory Programs Is Irrelevant To The Preemption Analysis

The Michigan Court of Appeals held that the $100-per-vehicle annual fee imposed by MCL § 478.2(2) is not preempted by 49 U.S.C. 14504(b) because the challenged assessment is a "regulatory" rather than a "registration" fee. J.A. 83-85. The court observed that the fee under MCL § 478.2(2) is "imposed for the administration of the [state Motor Carrier Act], particularly covering costs of enforcing safety regulations." J.A. 83. The court held that, "[i]f the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee." *Ibid.* That analysis is wholly misconceived.

Whatever the precise scope of the term "State registration requirement" in 49 U.S.C. 14504(b), nothing in the text or purposes of the statute suggests that its preemptive effect can turn on the use to which a particular state motor vehicle fee will be put *after* it has been collected. Section 14504, like its statutory and regulatory predecessors, limits the amount of the fee that a State may collect in certain circumstances but places no constraint on the State's subsequent use of the funds. Section 14504 has neither the purpose nor the effect of requiring that motor-vehicle assessments be spent for highway-related purposes; it serves instead to ensure that such assessments do not place a disproportionate burden on interstate commerce. MCL § 478.2(2) on its face effects precisely the singling out of interstate carriage that the $10-per-vehicle SSRS registration limit was intended to prevent. The statute is therefore preempted by federal law, regardless of the use to which the fees are subsequently put.[8]

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[8] Michigan law specifically reserves for the State's truck safety fund a segment (not less than 90% of any amounts in excess of $1,400,000 in a

E. The Fact That MCL § 478.2(2)'s Coverage Is Restricted To Vehicles License-Plated In Michigan Does Not Eliminate The Conflict With Federal Law

As the State emphasizes (see Br. in Opp. 2, 11, 17, 19, 20), the fee at issue in this case is imposed solely upon commercial motor vehicles license-plated in Michigan. That limitation on the scope of MCL § 478.2(2)'s coverage, however, does not save it from preemption.

1. As a general matter, the federal ban on "State registration requirement[s]" that "impose[] obligations in excess of the standards of the Secretary" of Transportation (49 U.S.C. 14504(b)), and the $10-per-vehicle limit on the fee that a State may charge under the SSRS (49 U.S.C. 14504(c)(2)(B)(iv)(III)), do not restrict a State's authority to collect otherwise lawful fees in connection with the separate process of registering and license-plating individual motor vehicles under state law. Thus, if the Michigan Legislature had simply increased by $100 each of the registration fees set forth in MCL § 257.801 (West 2001 & Supp. 2004), no SSRS preemption question would arise.[9] Unlike an ordinary license-plating charge, however, the fee imposed by MCL § 478.2(2) is assessed not upon motor vehicles generally, or upon a particular class of motor vehicles defined by weight or other physical attribute, but only upon motor vehicles "operating entirely in interstate commerce." Section 478.2(2) therefore effects precisely the singling out of

given year) of the SSRS fees that the State collects. MCL § 478.7(5); see J.A. 27 (State's affiant describes the implementation of that requirement). The statutory requirement that a portion of the State's SSRS fees be devoted to highway-related purposes simply highlights the illusory nature of the claimed distinction between "registration" and "regulatory" fees.

[9] With respect to vehicles covered by the IRP, however, that additional $100 increment would need to be apportioned among the States in which the trucks traveled according to the miles they traveled in each State. See pp. 3-4, 13, *supra*.

vehicles operating in interstate commerce that the SSRS $10-per-vehicle limit was intended to prevent.

Nothing in the text or history of 49 U.S.C. 14504 suggests that the SSRS fee limit is inapplicable to vehicles license-plated in the charging State. Any such exception would disserve Congress's objective of preventing the imposition of exorbitant fees specifically targeted at interstate carriage. Indeed, Michigan does not assert a right, *in its capacity as an SSRS registration State*, to charge a fee of greater than $10 for Michigan-plated vehicles. Its argument instead is that 49 U.S.C. 14504 is inapplicable here because the fee imposed by MCL § 478.2(2) is not framed as a charge for the registration of federal operating authority or of the other information specified in 49 U.S.C. 14504(c)(2)(A). But if we are correct in our basic submission (see pp. 14-20, *supra*)—*i.e.*, if 49 U.S.C. 14504 generally preempts any state registration requirement or fee that is imposed on vehicles *because* they operate in interstate commerce, even if the fee is not in terms a charge for registration of SSRS-related information—then the State's decision to impose such a charge only upon Michigan-plated vehicles cannot justify a different result here.

2. The preemption issue in this case is complicated by MCL § 478.2(2)'s immediately preceding subsection, MCL § 478.2(1). On its face, that subsection appears to impose a $100 annual fee on *every* "self-propelled motor vehicle operated by or on behalf of [a] motor carrier" operating in the State. Section 478.2(1) has been interpreted and applied by Michigan officials, however, as covering only those commercial motor vehicles that undertake point-to-point hauls within the State. See note 5, *supra*. Section 478.2(1) is not limited to vehicles license-plated in Michigan, but it does encompass all Michigan-plated vehicles that make intrastate hauls—which is to say, all Michigan-plated commercial vehicles that are *not* covered by MCL § 478.2(2).

The apparent practical effect of MCL § 478.2(1) and (2), taken together, is thus to impose a $100 fee (in addition to the much larger plating fees separately required by MCL § 257.801) on *every* commercial motor vehicle license-plated in Michigan, regardless of the nature of its operations. It therefore might be argued that MCL § 478.2(2) is not preempted by the SSRS because it is part of a larger statutory regime that, considered as a whole, does not discriminate against interstate commerce. For a variety of reasons, however, we believe that the preemption question presented in this case is properly resolved by considering MCL § 478.2(2) on its own terms, without reference to the preceding subsection.

a. Neither the Michigan Court of Appeals' opinion nor the State's brief in opposition suggests that MCL § 478.2(1) is relevant to the proper disposition of petitioners' preemption claim. The State's brief in opposition does emphasize that MCL § 478.2(2) applies only to vehicles license-plated in Michigan. The thrust of the State's argument, however, is that, so long as the fee is levied only on trucks with a significant regulatory "presence" in Michigan, as evidenced by license-plating within that State, the SSRS does not preclude the Legislature from imposing distinctive burdens on particular vehicles based on their operation in interstate commerce. See, *e.g.*, Br. in Opp. 17, 20. Michigan appears to construe 49 U.S.C. 14504 to preempt only those state requirements that expressly pertain to registration of the specific information provided by the carrier during the SSRS process. See Br. in Opp. 6. In light of the manner in which the State has litigated the issue on which the Court granted certiorari, this case squarely presents only the question whether SSRS preemption is in fact so limited, or whether the preemptive effect of Section 14504 extends to other laws that impose burdens on interstate carriers specifically *because* their vehicles operate in interstate commerce.

b. The opacity of the overall state statutory scheme provides further reason for considering MCL § 478.2(2) on its own terms. MCL § 478.2(1), on its face, would appear to impose a $100 annual fee on *all* trucks traveling in Michigan, including the Michigan-plated motor vehicles that operate solely in interstate commerce and are therefore covered by MCL § 478.2(2). If MCL § 478.2(1) were read in that manner, Section 478.2(1) and (2) would discriminate against interstate commerce even when taken together, by imposing *two* $100 fees rather than one upon those Michigan-plated trucks that conduct wholly interstate operations. As explained above, the MPSC does not in practice construe and apply MCL § 478.2(1) to cover vehicles operating entirely in interstate commerce. See note 5, *supra*. And for purposes of deciding *American Trucking Ass'ns* v. *Michigan Public Service Commission*, No. 03-1230, in which the constitutionality of MCL § 478.2(1) is directly at issue, it is appropriate for this Court to accept the shared understanding of the parties to *that* case that the State assesses the Section 478.2(1) fee only upon vehicles that undertake point-to-point hauls within Michigan. Given the State's failure to rely upon Section 478.2(1) in *this* case, however, there exists no similar justification for invoking a consideration (license-plating in Michigan) that does not appear in the text of Section 478.2(1) as a basis for disregarding the explicit terms of MCL § 478.2(2) that single out trucks operating in interstate commerce for assessment of a $100 fee.

c. Moreover, even as it appears to have been interpreted and applied by Michigan officials, MCL § 478.2(1) is not framed as a condition upon the issuance of a Michigan license plate. Rather, under the State's apparent administrative practice, the trigger for the Section 478.2(1) fee is the conduct of a particular type of trucking operation (point-to-point hauls within Michigan), not the decision to obtain a license plate in Michigan. As a result, Section 478.2(1) requires the

payment of a $100 fee for trucks license-plated in other States, as well as for Michigan-plated vehicles, if those trucks engage in point-to-point hauls in Michigan.

Under the IRP, fees for the registration of commercial motor vehicles are generally apportioned among the States in which a vehicle operates, based on the relative mileage traveled in each State. See pp. 3-4, 13, *supra*. Michigan law does not appear, however, to provide for the apportionment of fees collected under MCL § 478.2(1) or (2). See MCL § 257.801g (authorizing apportionment, when the IRP is applicable, of registration fees that would otherwise be assessed under MCL § 257.801(1)(j) or 801(1)(k) (West 2001 & Supp. 2004)); J.A. 64 (State's affiant recognizes that fees collected under MCL § 478.2(1) are not apportioned under the IRP). The State's apparent failure to apportion fees collected from interstate carriers under MCL § 478.2(1) and (2) reinforces the conclusion that Michigan regards those fees as something other than a license-plating charge.

There is consequently no basis to infer that the Michigan Legislature conceived of MCL § 478.2(1) and (2) as parts of an integrated scheme to assess a uniform $100 annual fee on every commercial motor vehicle license-plated in the State. It is therefore appropriate to take MCL § 478.2(2) at face value, as reflecting the Legislature's deliberate policy choice to impose distinct burdens on Michigan-plated vehicles that "operat[e] entirely in interstate commerce" and to make such interstate operations within the borders of Michigan the legal incidence of the fee. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 626 (1981) (focusing on the "operating incidence" of tax) (quoting *General Motors Corp.* v. *Washington*, 377 U.S. 436, 440-441 (1964)); cf. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 458-460 (1995) (validity of state tax on transactions in Indian country turns on the "legal incidence" of the tax, rather than on a judicial assessment of the tax's likely economic conse-

quences). Because the imposition of such burdens is flatly inconsistent with the limitations placed upon the States by 49 U.S.C. 14504, MCL § 478.2(2) is preempted by federal law.

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

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